86 - 1296

Supreme Court, U.S.
FILED
FEB 4 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Petitioner,

v.

UNITED AIR LINES, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MICHAEL E. ABRAM*
JAY P. LEVY-WARREN
CHRISTOPHER N. SOURIS
STEPHEN PRESSER
COHEN, WEISS and SIMON
330 West 42nd Street
New York, New York 10036
(212) 563-4100

Attorneys for Petitioner Air Line Pilots Association, International

**Counsel of Record*

490

QUESTIONS PRESENTED

1. Whether the Railway Labor Act protects newly-hired workers, who were not hired to be strike replacements, from employer retaliation when they participate in a lawful strike on the date designated by a carrier as their first day of employment.

2. Whether the court of appeals violated the principles established in *Icicle Seafoods, Inc.* v. *Worthington*, 106 S. Ct. 1527 (1986), by engaging in de novo factfinding after reversing the district court's legal standard for determining employee status under the Railway Labor Act.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	7
I. THE COURT OF APPEALS' CONSTRUCTION OF EMPLOYEE STATUS UNDER THE RLA PRESENTS IMPORTANT, UNRESOLVED QUESTION OF FEDERAL LAW AND CONFLICTS WITH DECISIONS OF THIS COURT, OTHER COURTS OF APPEALS, AND THE NATIONAL MEDIATION BOARD	7
II. THE COURT OF APPEALS IMPERMISSIBLY ENGAGED IN ITS OWN FACTFINDING IN DIRECT CONFLICT WITH RECENT DECISIONS OF THIS COURT	16
CONCLUSION	20

TABLE OF AUTHORITIES

CASES	PAGE
Air Line Pilots Ass'n, Int'l v. *Alaska Air Lines, Inc.*, 735 F.2d 328 (9th Cir. 1984)	9
Air Micronesia, 10 N.M.B. 11 (1982)	11, 12
Allied Chem. & Alkali Workers v. *Pittsburgh Plate Glass Co.*, 404 U.S. 152 (1971)	11
Anderson v. *City of Bessemer*, 105 S. Ct. 1504 (1985)	16
Arthur v. *United Air Lines, Inc.*, No. 85-Z-1835 (D. Colorado July 3, 1986)	18
Brotherhood of Locomotive Firemen v. *ICC*, 147 F.2d 312 (D.C. Cir.), *cert. denied*, 325 U.S. 560 (1945)	10
Brotherhood of R.R. Trainmen v. *Jacksonville Terminal Co.*, 394 U.S. 369 (1969)	7, 13, 16
Brotherhood of Ry. & S.S. Clerks v. *Florida E.C. Ry.*, 384 U.S. 238 (1966)	13
Chicago & N.W. Ry. v. *United Transp. Union*, 402 U.S. 570 (1971)	9
Demarco v. *United States*, 415 U.S. 449 (1974)	20
Icicle Seafoods, Inc. v. *Worthington*, 106 S. Ct. 1527 (1986)	*passim*
Nashville, C. & St. L. Ry. v. *Railway Employees' Dep't*, 93 F.2d 340 (6th Cir. 1937)	*passim*
NLRB v. *Erie Resistor Corp.*, 373 U.S. 221 (1963)	16
NLRB v. *Hearst Publications, Inc.*, 322 U.S. 111 (1944)	10

PAGE

NLRB v. *New England Tank Indus., Inc.*, 302 F.2d 273 (1st Cir. 1962) ..... *passim*

Northwest Airlines, Inc., 2 N.M.B. 19 (1948) .. 10

Pennsylvania R.R. v. *Day*, 360 U.S. 548 (1959) .. *passim*

Pomrening v. *United Air Lines, Inc.*, 448 F.2d 609 (7th Cir. 1971) 13

Pullman-Standard v. *Swint*, 456 U.S. 273 (1974) .. 17, 20

Railway Labor Executives' Ass'n v. *Boston & Maine Corp.*, 124 Lab.Rel.Rep. (BNA) 2145 (1st Cir. Dec. 22, 1986) 8

Scheduled Skyways, Inc., 12 N.M.B. 488 (1983) .. 12

South Chicago Coal & Dock Co. v. *Bassett*, 309 U.S. 251 (1940) 10

United Air Lines, Inc., 4 N.M.B. 30 (1965) 19

United Air Lines, Inc., 9 N.M.B. 266 (1982) 18, 19

United Air Lines, Inc., 10 N.M.B. 458 (1983) .. 18

STATUTES

28 U.S.C. § 1254(1) 2
28 U.S.C. § 1331 2
28 U.S.C. § 1337 2
29 U.S.C. § 151 10
29 U.S.C. § 158(d) 11
29 U.S.C. § 186(c)(5) 11
45 U.S.C. § 151, Fifth ..... *passim*
45 U.S.C. § 152, Fourth ..... *passim*
45 U.S.C. § 153, First (i) 8
50 U.S.C. App. § 459 13

PAGE

LEGISLATIVE HISTORY

Hearings on H.R. 7180 Before the House Committee on Interstate and Foreign Commerce, 69th Cong., 1st Sess. (1926) 9

RULES AND REGULATIONS

Fed.R.Civ.P. 52(a) 16, 17

14 C.F.R. § 121.434(b)(3) 19

14 C.F.R. § 121.441 19

MISCELLANEOUS

NMB Representation Manual (1985) 11, 12

IN THE

Supreme Court of the United States

October Term, 1986

No. 86-

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Petitioner,

v.

UNITED AIR LINES, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner Air Line Pilots Association, International ("ALPA") hereby requests that the Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit in this proceeding to the extent the court of appeals reversed the judgment of the United States District Court for the Northern District of Illinois.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-56a) is reported at 802 F.2d 886 (7th Cir. 1986). The findings of fact and conclusions of law entered by the district court (App. 57a-122a) are reported at 614 F. Supp. 1020 (N.D. Ill. 1985); the subsequent order of the district court modifying its findings of fact and conclusions of law (App. 123a-128a) is reported at 616 F. Supp. 849 (N.D. Ill. 1985).

JURISDICTION

The judgment of the court of appeals was entered on September 29, 1986. (App. 129a-130a). The order of the court of appeals denying rehearing was entered on December 22, 1986. (App. 131a-132a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case concerns the proper interpretation of §§ 1, Fifth and 2, Fourth of the Railway Labor Act ("RLA"), 45 U.S.C. §§ 151, Fifth and 152, Fourth. These and other pertinent statutory provisions are reprinted in the separately presented Appendix to this petition. (App. 133a-136a).

STATEMENT OF THE CASE

This petition raises issues of widespread importance in the air and rail transportation industries concerning the rights of newly-hired workers and the scope of permissible carrier coercion under the RLA. The case arose from the 1985 labor dispute between respondent United Air Lines, Inc. ("United") and petitioner ALPA, the authorized collective bargaining representative under the RLA for the pilots employed by United. In the course of that dispute, the United pilots engaged in a lawful strike over United's demand for a reduced pay scale for newly-hired pilots. Motivated by "anti-union sentiment" (App. 21a n.11), United responded to the imminent strike with measures in part designed "to destroy the union or at the very least discourage union membership." (App. 21a). ALPA thereupon commenced this action in the district court alleging that United's efforts to break the strike and to destroy ALPA violated the RLA; the district court's jurisdiction was based on 28 U.S.C. §§ 1331 and 1337.

Shortly after the conclusion of the strike, ALPA sought relief in the district court from three features of United's strike program: (1) United's effort to coerce several hundred newly-hired pilots (the "Group of 500") to serve as strikebreakers by threatening that they would "never, ever, work for this air line, ever" (App. 7a) if they joined the strike on the day designated by United as their first day of work; (2) United's attempt to reward nonstriking pilots, and punish strikers, by granting a form of superseniority to nonstriking pilots in a system-wide rebid of pilot positions; and (3) United's award of premium pay to certain pilots hired from other airlines to serve as strike replacements. This petition concerns United's coercion of the Group of 500, who were selected and trained by United for purposes of business expansion and who received offers of employment which "were not contingent on working during a strike" (App. 107a), but whom United refused to recall following the strike.

Beginning in the autumn of 1984, United experienced a pilot shortage as a result of workforce attrition and planned business expansion. (App. 63a). To meet its operational needs, United selected 600 of approximately 4,800 applicants, trained several hundred of these individuals for entry-level second officer positions, and informed them that they would have priority with respect to future offers of employment for those positions. (App. 65a-66a). Although members of this Group of 500 became provisionally qualified to serve as second officers upon the completion of their initial training, United declined to employ them while it negotiated with ALPA to obtain a reduced pay scale for new hires. (App. 64a-67a). The last time United hired pilots prior to the Group of 500, it placed them on the payroll on their first day of initial pilot training (App. 63a-64a); United immediately reverted to this practice on May 17, 1985, with respect to strike replacements. (App. 69a).

On April 20, 1985, United made unconditional written offers of pilot employment effective May 17, 1985, to the bulk of the Group of 500. (App. 67a). Under the RLA's mandatory process of negotiation and mediation, United either would reach agreement with ALPA for a reduced new-hire pay scale by that date or would be free to impose its final bargaining proposal concerning the new-hire pay scale. The Group of 500 accepted these offers of employment and, at United's direction, began reporting for a brief refresher training course in early May. During this period, United confirmed to the Group of 500 that their "change to 'permanent status will occur on May 17, 1985.' " (App. 67a) (quoting Pl. Ex. 6). Indeed, 150 Group members received written confirmation of their status as a "United Airlines line pilot" prior to May 17. (Court Ex. 1 ¶ 44; Pl. Ex. 75). United admitted that it did not hire the Group of 500 to serve as strikebreakers and that its job offers to Group members were not contingent on their working during a strike. (App. 68a, 107a-108a). Instead, United pursued an entirely separate hiring program to attract strike replacements. (App. 107a).

Despite these commitments, "after the Group of 500 had returned to [United's facilities in] Denver . . . United attempted to coerce them into serving during the strike." (App. 108a). Some of the Group of 500 members were warned that they "would not make it through their probation year" if they joined the strike. (App. 69a). Others were told they would be "terminated." (App. 70a). United's chief executive officer warned that, if the Group of 500 did not work during a strike, "they will never, ever, work for this airline, ever." (App. 69a).

On May 17, the United pilots began their strike over the reduced new-hire pay scale. At that point, the Group of 500 faced the following choice imposed by United: they

could either join the strike at the risk of never working for United or serve as strikebreakers and take the jobs of the pilots who were striking over United's demand for a reduced new hire pay scale which would apply to the Group of 500. Most of the Group of 500 decided to join the strike. Those who crossed the picket line were promptly placed on the payroll and given conditional pilot seniority numbers. (App. 69a; Pl. Exs. 82, 83). During the strike, United hired approximately 540 pilots through its strike replacement program; more than half of these pilots did not enter training until after the strike. (App. 125a-126a). United treated all the pilots who accepted offers of employment during the strike as permanent replacements. (App. 125a-126a). After the strike ended, United refused to recall the Group of 500 members who failed to cross the picket line "except for cases involving personal hardship or other extenuating circumstances." (App. 9a).

Following a two-week trial, the district court held that the Group of 500 were United employees as of May 17, 1985, under § 1, Fifth of the RLA, 45 U.S.C. § 151, Fifth, because United had unconditionally designated that date as their first day of work. (App. 103a-104a). Relying on the reasoning of *NLRB* v. *New England Tank Indus., Inc.*, 302 F.2d 273 (1st Cir. 1962), the district court concluded that "[p]hysically reporting to work to establish an employer-employee relationship is not a prerequisite to the right to strike on the first day of employment" (App. 103a) and "would be little more than an empty gesture." (App. 104a). The court further held that United's effort to coerce the Group of 500 into serving as strikebreakers violated § 2, Fourth of the RLA, 45 U.S.C. § 152, Fourth. (App. 101a-102a). The court ordered United to restore the striking Group of 500 members to the status of employees, with seniority dating from May 17, and enjoined United from

discriminating against striking pilots in the award of pilot positions. (App. 121a-122a). The district court also found that United's attempt to reward nonstriking pilots with a form of superseniority violated § 2, Fourth of the RLA and that United's premium payments to strike replacements were lawful. (App. 110a-114a). After a subsequent motion by United, the court modified its order to permit United to delay the recall of striking Group of 500 members until United had additional vacancies following the completion of training of the strike replacements. (App. 123a-128a).

On appeal by United and cross-appeal by ALPA, the court of appeals affirmed the district court's rulings as to the strike rebid scheme and the premium pay for replacements. The court explained that "the rebid was an attempt by United either to destroy the union or at the very least discourage union membership." (App. 21a). However, the court reversed the district court's conclusion that the Group of 500 members were statutory employees with the right to strike as of May 17, 1985. The court held that it was "forced to conclude" (App. 44a) that the "plain and ordinary meaning" of the RLA prohibited a newly-hired pilot from being treated as a statutory employee "unless [the pilot] has performed services for the employer under that employer's supervision." (App. 48a). The court of appeals thus reached the unlikely conclusion that the Group of 500 could not participate in ALPA's lawful strike over their pay scale without first serving as strikebreakers by "performing work" for United during the strike. In applying this newly-devised legal standard, moreover, the court of appeals engaged in a de novo resolution of disputed issues of material fact to determine that the Group of 500 had not actually "performed work" for United in May of 1985. (App. 44a-48a).

The court of appeals denied ALPA's petition for rehearing and suggestion for rehearing in banc on December 22, 1986 (App. 131a-132a), but later stayed the issuance of its mandate pending ALPA's filing of this petition.

REASONS FOR GRANTING THE WRIT

The court of appeals' novel construction of the RLA, which denied newly-hired pilots the statutory right to join a lawful strike on the date designated by the carrier as their first day of employment, presents important questions of federal law under § 1, Fifth and § 2, Fourth of the RLA that have not been, but should be, resolved by the Court. In addition, the court of appeals' interpretation of employee status under the RLA conflicts with a prior decision of the Court, decisions of the First, Sixth and Ninth Circuits courts of appeals and decisions of the National Mediation Board ("NMB"). Even if the court of appeals correctly interpreted § 1, Fifth, it disregarded the Court's recent decision in *Icicle Seafoods, Inc.* v. *Worthington,* 106 S. Ct. 1527 1986), by finding that the Group of 500 did not "perform work" for United despite the existence of material unresolved factual issues under its newly-devised legal standard.

I. THE COURT OF APPEALS' CONSTRUCTION OF EMPLOYEE STATUS UNDER THE RLA PRESENTS IMPORTANT, UNRESOLVED QUESTIONS OF FEDERAL LAW AND CONFLICTS WITH DECISIONS OF THIS COURT, OTHER COURTS OF APPEALS, AND THE NATIONAL MEDIATION BOARD.

Employees subject to the RLA "enjoy the right to engage in primary strikes over major disputes," *Brotherhood of R.R. Trainmen* v. *Jacksonville Terminal Co.,* 394 U.S. 369, 384 (1969), and, as the court of appeals reaffirmed in this case, enjoy statutory protection from employer retaliation

for participating in a lawful strike under § 2, Fourth of the RLA, 45 U.S.C. § 152, Fourth. (App. 16a-21a). *See also Railway Labor Executives' Ass'n* v. *Boston & Maine Corp.*, 124 Lab. Rel. Rep. (BNA) 2145, 2149-51 (1st Cir. Dec. 22, 1986). The court of appeals nonetheless felt compelled by the "plain meaning" of § 1, Fifth to hold that a newly-hired pilot may only join in a lawful strike on the day designated by a carrier as his first day of work without fear of employer retaliation if he first crosses the picket line and works as a strikebreaker. This construction of § 1, Fifth also prevents new hires from participating in the selection of a bargaining representative after they have been placed on the payroll but are awaiting their first work assignment, in direct conflict with the NMB's application of § 2, Fourth in representation disputes. Moreover, the court of appeals' construction of § 1, Fifth has created an unprecedented and powerful economic weapon for employers to coerce incumbent employees in exercising their right to strike.

1. Contrary to the court of appeals, the Court has recognized that the literal language of § 1, Fifth does not address the temporal issue of when a person becomes or ceases to be an "employee." In *Pennsylvania R.R.* v. *Day*, 360 U.S. 548 (1959), the Court held that employees who had retired and relinquished all rights to return to railroad service were included within the § 1, Fifth definition of "employee" for purposes of determining National Railroad Adjustment Board jurisdiction of "disputes between an employee . . . and a carrier" under § 3, First (i) of the RLA, 45 U.S.C. § 153, First (i). *See Day*, 360 U.S. at 550-53. The Court in *Day* rejected the position that, under the "plain meaning of its language," § 1, Fifth does not apply to a retiree, who "could not be, and was not 'in the service' of the railroad or 'subject to its continuing authority to supervise . . . the

manner of rendition of his service.' " *Id.* at 555-56 (Black, J., dissenting) (quoting 45 U.S.C. § 151, Fifth). Instead, the Court held that "[t]he purpose of the Act is fulfilled if the claim itself arises out of the employment relationship which Congress regulated." *Day*, 360 U.S. at 552; *accord Air Line Pilots Ass'n, Int'l* v. *Alaska Air Lines, Inc.*, 735 F.2d 328, 328-29 (9th Cir. 1984).

Notwithstanding the clear direction of the *Day* decision, the court of appeals believed "[i]t would be in direct contravention of the RLA's definition of employee to conclude that a person may become an employee even though he never performed any work for the employer and was never under that employer's direct supervision." (App. 47a). However, as the Sixth Circuit explained in *Nashville, C. & St. L. Ry.* v. *Railway Employees' Dep't*, 93 F.2d 340 (6th Cir. 1937), the primary phrase defining employee status in § 1, Fifth is "in the service of a carrier." The parenthetical phrase "(subject to its continuing authority to supervise and direct the manner of rendition of his service)" simply "codifies the common law rule of master and servant." *Id.* at 342. The testimony of labor spokesperson Donald Richberg in the 1926 RLA hearings confirms that this phrase was a term of art "taken from the classification orders of the Interstate Commerce Commission" and "used to distinguish between the regular employee of the railroad and the independent contractor." Hearings on H.R. 7180 Before the House Committee on Interstate and Foreign Commerce, 69th Cong., 1st Sess. 65 (1926).[1] Congress intended the clause "performs any

[1] As the Court has often noted, the 1926 RLA consisted of an agreement worked out between representatives of labor and the carriers which was subsequently enacted into law. *See, e.g., Chicago & N.W. Ry.* v. *United Transp. Union*, 402 U.S. 570, 576 (1971). As the labor spokesperson for that agreement, Richberg's statements in the congressional hearings "are entitled to great weight in the construction of the Act." *Id.*

work defined as that of an employee or subordinate official" to distinguish between statutory employees or subordinate officials and supervisors. *See Nashville*, 93 F.2d at 342; *see also Brotherhood of Locomotive Firemen* v. *ICC*, 147 F.2d 312, 315 (D.C. Cir.), *cert. denied*, 325 U.S. 560 (1945); *Northwest Airlines, Inc.*, 2 N.M.B. 19, 23-26 (1948). Accordingly, the court of appeals' conclusion that a person must first "perform work" for a carrier "under its supervision" to become an RLA employee under § 1, Fifth simply misapprehended statutory terms of art which Congress did not intend to determine when an RLA "employment relationship," *Day*, 360 U.S. at 552, begins or terminates.

2. Instead of using a "plain meaning" approach to determine "employee" status under § 1, Fifth, the Court in *Day* looked to "[t]he clash of economic forces which led to the passage of the Act, the history of the enactment, and the legislative policies which it expresses and which guide judicial interpretation," *Day*, 360 U.S. at 550, and the specific policy concerns embodied in the substantive RLA provision at issue in that case, *see id.* at 551-53. The *Nashville* court likewise rejected a "too literal" approach to construing § 1, Fifth and focused instead on the scope of RLA bargaining obligations to determine whether furloughees were "employees" for purposes of eligibility to vote for a bargaining representative. *See Nashville*, 93 F.2d at 343. The Court has also explained that the definition of "employee" in the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151 *et seq.*, can only be interpreted by reference to "the history, terms and purposes of the legislation" and " 'must be read in light of the mischief to be corrected and the end to be attained.' " *NLRB* v. *Hearst Publications, Inc.*, 322 U.S. 111, 124 (1944) (quoting *South Chicago Coal & Dock Co.* v. *Bassett*, 309 U.S. 251, 259 (1940)).

Indeed, the Court has interpreted the term "employee" in the NLRA to exclude retirees in applying an employer's obligation to bargain with "the representative of the employees" under 29 U.S.C. § 158(d) and to include retirees in defining the conditions on employer payments to a union trust fund for the benefit of "employees" under 29 U.S.C. § 186(c)(5). *See Allied Chem. & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 152, 166-71 (1971). In stark contrast to *Day*, *Nashville*, and these NLRA decisions, the court of appeals explicitly refused even to consider the purposes of § 2, Fourth in deciding that a newly-hired pilot cannot be an "employee" until he performs work under a carrier's supervision. (App. 44a n.17).

3. In determining whether the Group of 500 were employees for purposes of applying § 2, Fourth, the district court concluded that they became statutory employees on the date designated by United as their first day of employment. This conclusion is consistent with the "in the service of a carrier" language of § 1, Fifth, the decisions of the NMB and the Sixth Circuit in *Nashville*, and the purposes of § 2, Fourth.

If May 17, 1985, had been the eligibility cut-off date in a representation election rather than the first day of a strike, the district court's unreversed factual findings would clearly establish the Group of 500 as statutory employees for § 2, Fourth purposes. In determining which workers may exercise the § 2, Fourth right to select a collective bargaining representative, the NMB has explicitly included all individuals who have a substantial and reasonable expectation of performing future services for the carrier as RLA "employees" under § 1, Fifth.[2] In *Air Micronesia*, 10

[2] *See* NMB Representation Manual § 5.303 (1985) (temporary employee eligible to the extent he has "a reasonable expectation of

(footnote continued on following page)

N.M.B. 11 (1982), the NMB applied this reasonable expectation standard to exclude individuals who had completed training two years before the election but had never been offered employment, whose "present availability was unknown," and who "have at best the mere hope of an offer if an opening arises at some time in the future." *Id.* at 14-15. The court of appeals' construction of "employee" forecloses the inquiry mandated under *Air Micronesia* and substitutes its own test of whether an individual has ever "performed work" for a carrier. The court of appeals' interpretation of § 1, Fifth directly conflicts with the NMB decision in *Scheduled Skyways, Inc.*, 12 N.M.B. 488 (1983), that pilots undergoing initial pilot training while on the payroll of a carrier, but not yet assigned to fly the carrier's aircraft, are employees under § 2, Fourth. *See id.* at 489-91.

In *Nashville*, the Sixth Circuit likewise held that furloughees who possess seniority rights are "employees" for purposes of eligibility to vote for a bargaining representative because they have a present interest in negotiations which affect the rules, rates of pay and working conditions that will apply to them at such time, if any, that they may perform work for the carrier in the future. *See Nashville*, 93 F.2d at 343. In the absence of a strike on May 17, 1985 —the date designated by United for inclusion on the seniority list and assumption of permanent status (App. 67a; Court Ex. 1 ¶ 43)—members of the Group of 500 would have had the same expectation of ongoing employment as

---

(footnote continued from preceding page)

continued employment or reemployment"); *Id.* § 5.311 (disabled employee eligible "if the employee retains rights of reemployment"); *Id.* § 5.305 (furloughees eligible if they "retain an employer-employee relationship and have a reasonable expectation of returning to work.").

any incumbent United pilot and would have had the same interest in bargaining over rules, rates of pay and working conditions. Indeed, those who crossed the picket line on May 17 plainly had a statutory interest in pilot working conditions even though they did not perform any "work" for United on that date. (App. 69a). Under the *Nashville* court's construction of § 1, Fifth, the Group of 500 thus established an "employer-employee relationship" with United on May 17, 1985.[3]

4. In terms of the purposes underlying § 2, Fourth, the fact that most Group of 500 members respected the picket line cannot constitute a basis for denying employment status as of May 17, 1985. The right to engage in a lawful strike at the conclusion of the major dispute procedures mandated by the RLA is an "integral" element of the effective exercise of the § 2, Fourth right to engage in collective bargaining. *See Jacksonville Terminal,* 394 U.S. at 384-86; *cf. Brotherhood of Ry. & S.S. Clerks* v. *Florida E.C. Ry.*, 384 U.S. 238, 246-47 (1966). Thus, to effectuate the purposes of § 2, Fourth, the protection from retaliation for engaging in a lawful strike must at least extend to all those who would otherwise be eligible to select and join with a representative in engaging in collective bargaining.

In the district court, United claimed that the Group of 500 never formed an employer-employee relationship with United because they never "reported to work" and had their payroll forms signed by United. Yet the record established that payroll forms for newly-hired strikebreakers were not

---

[3] At a time when United placed student pilots on the payroll at the commencement of their initial training, United never questioned their employee status as of their first day of initial pilot training under a statutory standard ("in the employ of any employer") indistinguishable from the "in the service" language of the RLA. *See Pomrening* v. *United Air Lines, Inc.*, 448 F.2d 609, 611 (7th Cir. 1971) (construing 50 U.S.C. App. § 459).

signed until days or weeks after they were placed on the payroll as of May 17. (Pl. Exs. 82, 83). Moreover, the district court found that "[p]hysically reporting to work to establish an employer-employee relationship is not a prerequisite to the right to strike on the first day of employment." (App. 103a). Regardless of its justification in other circumstances, a "report to work" requirement only serves an anti-union purpose when applied in a strike because the sole distinction between those who report to work and those who do not is whether they oppose or join the strike. Thus, in *NLRB* v. *New England Tank Indus., Inc.*, 302 F.2d 273 (1st Cir. 1962), the First Circuit rejected an employer's contention that three individuals who had been offered and accepted employment, but who engaged in a strike on the day designated as their first day of work, "had never actually effectuated an employer-employee relationship with the company and therefore could not 'strike' against it." *Id.* at 277. Instead, the court held that "to insist on a requirement that the three men physically report to the job before going on strike would be little more than an empty gesture." *Id.* at 278.

The court of appeals recognized that *New England Tank* "may at first glance seem to support the district court's conclusion" (App. 46a), did not question that both the RLA and NLRA protect strikers from employer coercion, and did not challenge the *New England Tank* court's application of this policy to a strike under the NLRA. (App. 46a-47a). Instead, it regarded "the plain and ordinary meaning of the words" of § 1, Fifth to be conclusive in the absence of "convincing evidence that Congress did not intend that the RLA's definition of employee meant what it said." (App. 47a-48a). As explained above, however, both the legislative history of the RLA and the Sixth Circuit's opinion in *Nashville* convincingly demonstrate that

the "supervision" and "performs any work" clauses of § 1, Fifth do not refer to preconditions to being "in the service of a carrier," but plainly express, through statutory terms of art, the distinction between employee status and independent contractor or supervisory status. *See supra* pp. 8-10. Given this legislative history and the purposes of § 2, Fourth, the court of appeals should have followed the First Circuit by holding that the Group of 500 had the right to strike under the RLA on the date designated by United as their first day of employment.

5. The district court both determined that the Group of 500 became employees on May 17, 1985, and further concluded that, even prior to May 17, "United's belated attempt to require members of the Group of 500 to cross a lawful picket line as a condition of employment is unlawful under the RLA." (App. 103a). When considered in the context of United's overall program to break the pilot strike (App. 21a), which included its attempts to coerce the Group of 500 to become strikebreakers (App. 69a, 76a-79a),[4] the district court's decision that United's threats prior to May 17 were unlawful effectuated the purposes of § 2, Fourth to protect the rights of employees, including incumbent pilots, to engage in a lawful strike.

In reversing the district court, the court of appeals authorized carriers to obtain involuntary, coerced strikebreakers, in addition to voluntary strike replacements, and thereby created a powerful economic weapon for carriers to use against incumbent employees. To recognize protected "employee" status only after work is performed during a strike, but to allow permanent replacement status to attach at the point the replacement accepts an offer of permanent employ-

---

[4] United did not hire the Group of 500 to serve as strikebreakers (App. 68a), but had a separate program for hiring strike replacements. (App. 107a).

ment,[5] gives carriers a judicially-created advantage in the exercise of self-help without any statutory basis. *See generally Jacksonville Terminal,* 394 U.S. at 391-93.

While hiring voluntary permanent replacements may not violate § 2, Fourth of the RLA or comparable NLRA provisions, any additional employer measures to obtain strikebreakers must be carefully scrutinized to determine the employer's actual motivation and business purpose. (App. 17a-21a). *See generally NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221, 235-37 (1963). In this case, United's anti-union purposes and its lack of business justification for coercing the Group of 500 to cross the picket line are firmly established in the district court's findings. (App. 70a-72a, 103a, 107a-108a). Accordingly, §§ 1, Fifth and 2, Fourth should be construed to apply to carrier attempts to coerce new hires to become strikebreakers in order to effectuate the right of all "employees" to engage in a lawful strike.

II. THE COURT OF APPEALS IMPERMISSIBLY ENGAGED IN ITS OWN FACTFINDING IN DIRECT CONFLICT WITH RECENT DECISIONS OF THIS COURT.

The Court has unequivocally held that Rule 52(a) of the Federal Rules of Civil Procedure prohibits a federal court of appeals from making "factual findings on its own." *See Icicle Seafoods, Inc.* v. *Worthington,* 106 S. Ct. 1527, 1530 (1986); *Anderson* v. *City of Bessemer,* 105 S. Ct. 1504, 1512-13 (1985). Particularly when a court of appeals reverses a district court on the applicable legal

---

[5] In this case, the district court held that United's 539 newly-hired strikebreakers attained permanent replacement status at the time they accepted United's offer of employment, not when they actually "performed work" for the carrier. (App. 127a). Only 64 of these strikebreakers were placed in line service during the strike; 272 had not even commenced initial pilot training before the strike ended. (App. 127a-128a; Smith Aff. ¶ 3-5).

standard, Rule 52(a) compels "a remand . . . unless the *record* permits *only one* resolution of the factual issue," *Pullman-Standard* v. *Swint*, 456 U.S. 273, 292 (1974) (emphasis added), just as it compels a remand where the district court "failed to make findings of fact essential to a proper resolution of the legal question," *Icicle Seafoods*, 106 S. Ct. at 1530.

Even assuming the validity of the court of appeals' new legal standard for "employee" status under the RLA, the court of appeals impermissibly *found*, as a matter of fact, that the Group of 500 "never performed any work for United nor did they ever submit to United's supervision of them in their work." (App. 44a). The district court had no occasion to and did not make factual findings concerning the performance of "work" under United's "supervision" simply because facts concerning the Group of 500's activities, while dispositive of the issue under the court of appeals' new standard, were irrelevant to the district court's focus on United's unconditional designation of May 17 as the first day for permanent employment status. Moreover, the district court never considered the status of any subgroup within the Group of 500, based on their activities or otherwise, at any point in time between the commencement of initial training and May 17, 1985. Questions concerning the Group of 500's "particular activities" and "how [they] spent their . . . time" are "question[s] of fact" for the district court which are "essential to a proper resolution of the legal question" as newly defined by the court of appeals, *see Icicle Seafoods*, 106 S. Ct. at 1530, but were not the subject of factfinding pursuant to the district court's legal standard.

Moreover, the court of appeals relied on the absence of any "dispute regarding the factual findings made by the

district court surrounding the Group of 500" to conclude that the only "issue is whether, *given these facts,*" the Group of 500 satisfied the legal standard for "employee" under the RLA. (App. 42a) (emphasis added). This conclusion utterly ignored the court's obligation under *Swint* to review the record as a whole—not merely the district court's factual findings—and to determine whether "the record permits only one resolution of the factual issue" under a newly-adopted legal standard. *Swint*, 456 U.S. at 292. Even a cursory review of the record, however, compels the conclusion that the court of appeals' new legal standard gives rise to numerous disputed issues of material fact which can only be resolved by the district court.

For instance, the record thus far indicates that approximately 16 of the Group of 500 had "dates of hire" by United prior to May 17 (Pl. Ex. 90), and that an undetermined number of these were employed as Flight Officer Training Instructors ("FOTI's") prior to that date. (Tr. 1484-85, 1487). The NMB has twice held that United's FOTI's are "employees" under the RLA. *United Air Lines, Inc.*, 10 N.M.B. 458, 466-67 (1983); *United Air Lines, Inc.*, 9 N.M.B. 266, 280-81 (1982). Indeed, in a separate lawsuit, the court explicitly found that five former United FOTI's who are members of the Group of 500 were "employees" under the RLA at the time of the 1985 strike. *See Arthur* v. *United Air Lines, Inc.*, No. 85-Z-1835 (D. Colorado July 3, 1986) (order). Additional factfinding is therefore required to determine the number of FOTI's in the Group of 500 employed by United prior to the strike, and any other positions in which United employed Group of 500 members prior to May 17.

Another group of approximately 10-12 of the Group of 500 had both completed their refresher training and

performed their initial operating experience ("IOE") prior to May 17. (App. 69a-70a). Pilots performing their IOE operated United aircraft under the supervision of a United check airman (Tr. 1185-87) in accordance with Federal Air Regulations which require that IOE "must be acquired in flight during operations under this part." 14 C.F.R. § 121.434(b)(3). Accordingly, the record plainly permits the finding that this subgroup "performed work" under United's supervision; for this reason alone, the court of appeals was obliged to remand this case to the district court for new factfinding. *See Icicle Seafoods,* 106 S. Ct. at 1530; *Swint,* 456 U.S. at 292.

In addition, the bulk of the Group of 500 had completed their initial qualification training prior to May 17 and were therefore "provisionally qualified to serve as United second officers, lacking only their IOE to become fully qualified." (App. 66a-67a). Even assuming that the initial qualification training did not constitute work under United's supervision, the court of appeals erred in simply assuming that the refresher training in May could not constitute work under a carrier's supervision. Engaging in recurrent, transition, upgrading, and requalification training is an integral part of serving as a United pilot. *See United Air Lines, Inc.,* 9 N.M.B. at 276-79; *United Air Lines, Inc.,* 4 N.M.B. 30, 35-36 (1965); *see also* 14 C.F.R. § 121.441 (mandating annual proficiency training or checks). The extent to which United's "refresher" training was different from initial qualification training or similar to the various types of recurrent and other training in which United pilots routinely engage constitutes a question of fact which was not addressed by either the district court or the court of appeals but is obviously "essential to a proper resolution of the legal question" under the court of appeals' interpretation of § 1, Fifth. *See Icicle Seafoods,* 106 S. Ct. at 1530.

At the very least, the record in this case presents substantial factual issues material to the court of appeals' new legal standard which the district court never addressed. Having reversed the district court on the legal standard, " 'the Court of Appeals should not have resolved in the first instance th[ese] factual dispute[s] which had not been considered in the District Court.' " *See Swint*, 456 U.S. at 292 (quoting *Demarco* v. *United States*, 415 U.S. 449, 450 n.* (1974)); *see also Icicle Seafoods*, 106 S. Ct. at 1530 (same).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MICHAEL E. ABRAM*
JAY P. LEVY-WARREN
CHRISTOPHER N. SOURIS
STEPHEN PRESSER
COHEN, WEISS and SIMON
330 West 42nd Street
New York, New York 10036
(212) 563-4100

Attorneys for Petitioner Air Line Pilots Association, International

**Counsel of Record*

February 2, 1987

Supreme Court, U.S.
FILED
FEB 4 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1296

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Petitioner,

v.

UNITED AIR LINES, INC.,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MICHAEL E. ABRAM*
JAY P. LEVY-WARREN
CHRISTOPHER N. SOURIS
STEPHEN PRESSER
COHEN, WEISS and SIMON
330 West 42nd Street
New York, New York 10036
(212) 563-4100

Attorneys for Petitioner Air Line Pilots Association, International

**Counsel of Record*

TABLE OF CONTENTS

	PAGE
Air Line Pilots Ass'n, Int'l v. *United Air Lines, Inc.*, Nos. 85-2726 & 85-2833 (7th Cir. Sept. 29, 1986) (opinion)	1a
Air Line Pilots Ass'n, Int'l v. *United Air Lines, Inc.*, No. 85-4765 (N.D. Ill. Aug. 1, 1985) (findings of fact and conclusions of law)	57a
Air Line Pilots Ass'n, Int'l v. *United Air Lines, Inc.*, No. 85-4765 (N.D. Ill. Sept. 5, 1985) (order amending findings of fact and conclusions of law)	123a
Air Line Pilots Ass'n, Int'l v. *United Air Lines, Inc.*, Nos. 85-2726 & 85-2833 (7th Cir. Sept. 29, 1986) (judgment)	129a
Air Line Pilots Ass'n, Int'l v. *United Air Lines, Inc.*, Nos. 85-2726 & 85-2833 (7th Cir. Dec. 22, 1986) (order denying rehearing)	131a
Statutory Excerpts	133a

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 85-2726 and 85-2833

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Plaintiff-Appellee, Cross-Appellant,

v.

UNITED AIR LINES, INC.,

Defendant-Appellant, Cross-Appellee.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 85 C 4765—**Nicholas J. Bua**, *Judge.*

ARGUED APRIL 16, 1986—DECIDED SEPTEMBER 29, 1986

Before WOOD, JR., and COFFEY, *Circuit Judges*, and NOLAND, *District Judge.**

WOOD, JR., *Circuit Judge.* This case arises out of a twenty-nine day strike by the Air Line Pilots Association, International ("ALPA") against United Air Lines, Inc. ("United"). Although the parties ultimately reached a new

---

* The Honorable James E. Noland, Chief Judge of the United States District Court for the Southern District of Indiana, is sitting by designation.

collective bargaining agreement, three issues which evolved as a result of the strike remain for judicial resolution. The first issue concerns United's plan that allowed pilots who worked during the strike to "bid" for vacancies left by the striking pilots. The second issue involves permanent replacement pilots that United hired during the course of the strike. United agreed to pay these pilots a guaranteed salary as a means of inducing them to work for the airline. The final issue involves the treatment of prospective new second officers who were in training prior to the commencement of the strike (hereinafter the "Group of 500"). United had anticipated using these trainees as replacement pilots and had offered them employment beginning on May 17, 1985, the day ALPA went on strike.

With respect to these issues, ALPA filed suit alleging various violations of the Railway Labor Act, as amended, 45 U.S.C. § 151 *et seq.* (1982) (the "RLA" or the "Act"). Following a ten-day trial, Judge Nicholas J. Bua concluded: (1) that United had violated the RLA by opening vacancies to rebidding by pilots who had crossed the picket line; (2) that the terms and conditions under which United hired its permanent replacements, including the guaranteed salaries, were lawful; and (3) that the Group of 500, although not employees during their training period prior to the strike, became employees of United on May 17, and that United's failure to extend them employee status on that date was in contravention of the RLA. In the alternative, even assuming that the Group of 500 never became employees, the trial judge found that United: (1) violated the RLA's status quo provisions by treating the trainees as non-employees during the training period; and (2) violated the RLA's provision against coercing persons not to join a union by making employment for the Group of 500 contingent on crossing the picket line.[1] The district court initially enjoined United from implementing the bid awards made during the strike as well as barred the airline from giving nonstrikers preference in any vacancy arising sub-

[1] The district court's opinion is reported at 614 F. Supp. 1020.

sequent to the strike. The court also ordered United to reinstate those members of the Group of 500 who had respected the picket line and "to assign them immediately to line pilot service if they completed their training, and otherwise permit them to complete their training without discrimination, and then enter line service, with seniority in all cases accrued from May 17, 1985." 614 F. Supp. at 1051. Thereafter, the district court amended its order regarding the Group of 500 to provide that United only be required to place these pilots on a preferential hiring list so that they would be hired as positions became available. In addition, the court denied ALPA's motion seeking back pay for the Group of 500.

On appeal, United argues that the court erred in holding: (1) that its bidding procedures were unlawful; (2) that the Group of 500 became employees on May 17; and (3) that the status quo provisions of the RLA were violated by United's considering the Group of 500 as non-employees during training. United also argues that the district court erred in granting injunctive relief to ALPA since the union had used economic coercion during the statutory status quo period before the strike and had initially refused to ratify its agreement with United until United reached a satisfactory back-to-work agreement with its flight attendants. ALPA cross-appeals alleging that the district court erroneously: (1) upheld United's guaranteed salaries to replacement pilots; (2) ruled that the Group of 500 were not entitled to immediate reinstatement; and (3) refused to award the Group of 500 back pay for the time between the end of the strike and their reinstatement.

We affirm the district court's decisions with respect to the replacement pilots and the implementation of the rebid procedures. However, we reverse the court's decision regarding the Group of 500.

I.

The district court made extensive findings of fact which we summarize below. We are, of course, required to adopt

these factual findings unless they are shown to be clearly erroneous. *See* Fed. R. Civ. P. 52(a).[2]

The present action was commenced by ALPA on May 16, 1985, *i.e.*, one day prior to the commencement of the strike. ALPA is the duly certified representative for United's airline pilots under the RLA. The representation of United's pilots is controlled by the United Air Lines Master Executive Council ("UAL-MEC"). UAL-MEC is composed of three elected member pilots from each of United's nine pilot domiciles.[3]

For a number of years prior to the strike United and ALPA had been parties to successive collective bargaining agreements. The agreement controlling prior to the strike had been in effect since October 1981. This agreement was to be effective until October 1983 and would automatically renew itself for a one-year period each October thereafter unless either party sought a change. In

---

[2] Rule 52(a) provides in pertinent part:

> Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

As defined by the Supreme Court, a factual finding is not clearly erroneous if "plausible in light of the record viewed in its entirety," even if the appellate court "would have weighed the evidence differently" and reached the opposite conclusion. *Anderson v. City of Bessemer City*, 105 S. Ct. 1504, 1512 (1985). An appellate court should overturn a district court's finding of fact only if after having reviewed the entire evidence it " 'is left with the definite and firm conviction that a mistake has been committed.' " *Id.* at 1511 (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)). Unlike findings of fact, the district court's conclusions of law are subject to *de novo* review on appeal.

[3] Each of United's pilots operates from one of nine bases known as domiciles. A domicile is the place from which a pilot's assignment begins and to which he returns. At the time of the strike, United's pilot domiciles were Chicago, Cleveland, Denver, Honolulu, Los Angeles, Miami, San Francisco, Seattle, and Washington.

January 1984, both parties served notice of their desire to discuss new contractual terms. United sought to renegotiate, among other things, compensation to be paid both incumbent employees and new hires as well as the method used to assign cockpit seats to pilots. United was seeking changes, in part, as a result of economic pressures to cut costs which accompanied the deregulation of the airline industry. As negotiations progressed, it became obvious that the key issue was United's desire to have a reduced pay scale for those pilots hired during the duration of a new agreement. United expressed concern that without cost-cutting measures it would not be competitive in the newly deregulated market. Indeed, although United had an operating profit of in excess of $500 million in 1984, it had sustained operating losses in the preceding five years.

Although continuing with the negotiations, United, in the fall of 1984, began to prepare for a pilots' strike by establishing a task force to develop contingency plans. The task force devised the "operations adjustment plan" which had an objective of breaking any strike and forcing settlement on United's terms. At the same time, United also began to experience a shortage of pilots. United had last hired pilots during the period from 1977-1979. At that time, it had been United's policy to consider its student pilots as employees beginning with their first day of training. These trainees were paid and earned seniority from the first day of their hire. Once these student pilots completed the training process, they were brought into United to serve in the entry-level position of second officer.[4]

With the need for new pilots evident, United, beginning in November 1984, selected numerous candidates (*i.e.*, the Group of 500) for its training program. During this time, however, while United negotiated with ALPA with respect to the new-hire pay scale, the airline did not want

---

[4] United employs pilots in three categories: captain, first officer, and second officer.

the trainees on its property fearing that their presence would make an agreement with ALPA on new-hire pay more difficult. United also was opposed to paying the trainees the rates for incumbents as provided in the 1981 agreement. United therefore stated that these trainees would not be offered employment until after an agreement had been reached with ALPA. Indeed, the student pilots who were selected for training were required to execute a "Flight Officer Training Agreement." Under this agreement, the student pilots would receive training without charge from United as well as $30 per day to cover their expenses. The students agreed that during training they were not employees of United and received no compensation for their services apart from the expense money. The agreement, which each trainee signed, also provided:

> I understand that graduates of Flight Officer Training will constitute a pool of trained candidates for Flight Officer employment, which United Airlines may employ, if needed, within twelve months of graduation. I understand that in order to be offered such employment, that I must continue to meet the requirements and qualifications for the flight officer position.

Pursuant to the agreement United was free, without incurring liability, to terminate the training or never make an offer of permanent employment.

In April 1985, United offered approximately 375 members of the Group of 500, who had successfully completed their training, positions as second officers. The offers of employment were effective May 17, 1985, regardless of whether a strike had commenced. The district court concluded that when initially offered employment the Group of 500 were not hired to serve as "crossovers" in the event of a strike. Indeed, several of the student pilots indicated that United had told them that they would not be asked to cross a picket line. As the May 17 strike deadline approached, however, United began to see the

Group of 500 as strike replacements and informed the members that if they failed to report to work they would not work for the airline in the future. In fact, United's Chairman and Chief Executive Officer Richard Ferris commented:

> We have got 500 pre-hires, right? Those pre-hires are all going, they've been given notice, and come 0001 May 17, they're employed, boom. If they don't show up to work, they will never, ever, work for this air line, ever, because they're not on the property, they won't have a number, they don't have anything.

Nonetheless, the student pilots had a disincentive to report to work during a strike. Under ALPA's constitution and bylaws a member-pilot is subject to expulsion for "[p]erforming work for or assisting an airline during a period when the members of [ALPA] are on strike against such airline." ALPA constitution art. VIII, § 2(A)(5). Moreover, applicants for ALPA membership who were "involved in alleged strikebreaking shall not be accepted for membership" except, as the district court found, pursuant to rigorous procedures. *Id.*, art. II, § 10(B).

Apart from plans regarding the Group of 500, United also promised other policy changes in an attempt to lure pilots across the picket line in the event of a strike. These plans were communicated to United's pilots via letters and various "road shows" undertaken by United management personnel. One plan called for United to allow "bidding" for positions opened up by a strike. Under United's bid procedure, pilots could express their interest for, among other things, vacant higher-level positions for which they were qualified as well as for other pilot domiciles. If a pilot's bid was accepted, he was then able to advance to his desired position. By allowing a rebid of the entire airline subsequent to the commencement of a strike, United sought to induce its pilots to ignore the strike for fear that they would lose their present positions and be impeded from advancing in the future by less-senior pilots.

In addition to rebidding the airline, United also informed its pilots that it was intending, in the event of a strike, to hire as permanent replacements for striking pilots outside individuals who were already qualified to serve as captains or first officers. To induce these "fleet-qualified" pilots to work for the airline during a strike, United was prepared to pay captains an annual salary of $75,000 and first officers a salary of $50,000. United also promised to guarantee these salary levels even if the replacement pilots were later reassigned to lower positions. Use of these guaranteed salaries was another means United hoped would help keep the airline flying in the event of a strike.

By April 15, 1985, United and ALPA had failed to reach a new collective bargaining agreement and the National Mediation Board ("NMB"), which had become involved in the negotiations during the previous August, declared an impasse in negotiations. On April 16, the final thirty-day "cooling-off" period mandated by the RLA began. During this period United and ALPA continued their collective bargaining, but their efforts were to no avail. On May 17, ALPA struck United. Approximately 500 pilots reported to work during the first three days of the strike, 250 of these being management pilots. Only a few members of the Group of 500 crossed the picket line and those already at United facilities left.

Shortly after the strike began, United cancelled all of its pilot assignments both for striking and nonstriking pilots. The result of this action was to create vacancies in every position in the airline. Nonstriking pilots who had reported to work before 6:00 p.m. Chicago time on May 19 were allowed to bid on these vacancies with the exception of the Miami and Washington domiciles. The vacancies were not actually awarded until after June 1, 1985, and, during the strike, no pilot was activated in any assignment awarded to him in the rebid. As a result of the rebid, nonstriking pilots were able to leapfrog over more senior striking pilots. In addition to the rebid, United also employed the guaranteed salaries to attract

fleet qualified pilots to serve as permanent replacements for striking pilots.

For its part, ALPA also took actions both before and during the strike in order to protect its interests. United alleges that, prior to the strike, ALPA undertook a campaign to inform travel agents around the country of the impending strike and suggested that these agents book their clients on airlines other than United. Moreover, United also contends that ALPA members engaged in a concerted abuse of sick leave to put economic pressure on the airline as well as picketed the World Trade Conference hosted by United's Chairman and Chief Executive Officer Richard Ferris in an attempt to dissuade conference attendees from using United. Once the strike began, ALPA also instructed its strike supervisors to take pictures of the pilots and management personnel who crossed the picket line. ALPA also photographed working pilots at this time.

During the course of the strike, ALPA and United resumed their contract negotiations. In June 1985, the parties reached a tentative back-to-work agreement. Under this agreement the pilots would return to work and assume the same positions they had held prior to the strike. Both United and ALPA agreed not to punish either the striking or nonstriking pilots. With respect to the status of the members of the Group of 500, the rebid, and the replacement pilots, however, United agreed that ALPA would pursue its claims in the district court. Although United agreed to restore all pilots to their pre-strike positions, when new vacancies arose, either due to attrition or expansion, United stated it would award the vacancies, in order of seniority, to nonstriking pilots who had been awarded similar positions during the strike rebid. In other words, nonstrikers were to be given preference over strikers. United also maintained that it would not hire any member of the Group of 500 who had failed to report to work except for cases involving personal hardship or other extenuating circumstances. Finally, United stated that it planned to continue to pay the guaranteed salaries to the fleet-qualified replacements.

Apart from its own agreement, ALPA had also discussed with United how the airline would handle its dispute with the Association of Flight Attendants ("AFA") whose members had honored ALPA's picket line. In keeping with a pre-strike commitment, ALPA maintained that its back-to-work agreement would be contingent upon AFA also reaching a back-to-work agreement. Ultimately AFA released ALPA from its commitment. ALPA subsequently ratified the tentative agreement with United and the strike came to an end.

ALPA filed suit alleging that United's actions with respect to the Group of 500, the rebid procedure, and the guaranteed salaries for the replacement pilots violated the RLA. The district court agreed with ALPA regarding the rebid and the Group of 500, but held that the hiring of the replacement pilots was lawful. The court ordered that United be enjoined from implementing the strike bid awards and also from preferring nonstrikers over strikers in vacancies that may arise. The court directed United to restore the Group of 500 to employee status and to assign them immediately to line service if they have completed training or allow them to first complete training. In so ruling, the district court rejected United's contention that ALPA was not entitled to injunctive relief on grounds that it had violated the RLA by conditioning the end of the strike upon United reaching a back-to-work agreement with AFA and by otherwise acting with "unclean hands."

The court subsequently amended its order noting that the Group of 500 had been permanently replaced during the strike and hence that they had no right to immediate employment, but rather were to be given preference when vacancies arose. The court also denied ALPA's motion seeking back pay for the Group of 500. The court noted that since these pilots had been properly replaced during the strike they were entitled to only back-dated seniority and preferential hiring.

United appeals the court's decision arguing that it was error to hold the airline in violation of the RLA with respect to the Group of 500 and the rebid procedure. Even

if its actions are unlawful, United contends that ALPA is not entitled to injunctive relief. ALPA cross-appeals alleging that, among other things, the court erred in holding that United's hiring of replacements was lawful and in ruling that members of the Group of 500 were not entitled to either immediate reinstatement or back pay.

II.

Before reaching the merits of this case, it is necessary that we first briefly examine the relevant provisions of the RLA.[5] As the Supreme Court noted in *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369 (1969), the "heart" of the RLA is the duty placed on management and labor " 'to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes . . . in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.' " *Id.* at 377-78 (quoting 45 U.S.C. § 152, First (1982)). *See* 45 U.S.C. § 151a(1) (one purpose of the RLA is "[t]o avoid any interruption to commerce or to the operation of any carrier engaged therein"). *Accord Chicago & North Western Railway v. United Transportation Union*, 402 U.S. 570, 574 (1971). The RLA was enacted to encourage collective bargaining by the parties "in order to prevent, if possible, wasteful strikes and interruptions of interstate commerce," especially in cases where major disputes[6] are involved. *Detroit & Toledo Shore Line Railroad v. United*

[5] Congress made the RLA applicable, with few exceptions not relevant here, to the airline industry in 1936. *See* 45 U.S.C. § 181 *et seq.* (1982).

[6] Non-representational disputes arising under the RLA are characterized either as major or minor disputes. Depending upon the type of dispute encountered, the RLA prescribes different adjustment procedures for resolution. A minor dispute is one involving questions regarding the application or interpretation of an existing collective bargaining agreement. Conversely, a major dispute, such

(Footnote continued on following page)

Transportation Union, 396 U.S. 142, 148 (1969) (footnote omitted).

In settling major disputes such as the one involved here under the RLA a two-stage process is followed. The party seeking a change in rates of pay, rules, or working conditions must first give notice and confer with the other party. 45 U.S.C. § 156 (1982). *See* 45 U.S.C. § 152, Second (1982). If this conference fails to resolve the dispute, either or both parties may seek the mediation services of the National Mediation Board. The NMB may also act, *sua sponte*, in an emergency situation. 45 U.S.C. § 155, First (1982). If mediation by the NMB proves to be unsuccessful, the NMB is required to endeavor to induce the parties to submit the matter to binding arbitration. However, arbitration cannot be forced upon the parties; rather, arbitration is permitted only where the parties mutually consent. 45 U.S.C. §§ 155, First, 157 (1982). If arbitration is rejected and if the dispute threatens "substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service," the NMB must contact the President who is then free to create an emergency board to "investigate and report respecting such dispute." 45 U.S.C. § 160 (1982). Throughout this first step of the mandated dispute resolution, the parties are barred from unilaterally altering the established status quo. 45 U.S.C. §§ 152, Seventh, 155, First, 156, 160 (1982).

---

[6] *continued*
as the one involved here, "relates to . . . the formation of collective bargaining agreements or efforts to secure them." *Elgin, Joliet & Eastern Railway v. Burley*, 325 U.S. 711, 723 (1945). *See Burlington Northern Railroad v. Brotherhood of Maintenance of Way Employees*, No. 86-1666, slip op. at 7-8 (7th Cir. June 4, 1986). The RLA does not use the terms "minor" and "major" dispute; rather, these terms were coined by the Supreme Court in *Elgin, supra. Local 553, Transport Workers Union of America v. Eastern Air Lines, Inc.*, 695 F.2d 668, 673 (2d Cir. 1982).

Once these procedures have been followed without the dispute being resolved, the parties are free in the second stage, except as they may be otherwise limited by statute, to engage in economic self-help. Although the RLA is silent as to what may lawfully occur in this period, *Burlington Northern Railroad v. Brotherhood of Maintenance of Way Employees*, No. 86-1666, slip op. at 10 (7th Cir. June 4, 1986), it is undisputed that "[i]mplicit in the statutory scheme . . . is the ultimate right of the disputants to resort to self-help—'the inevitable alternative in a statutory scheme which deliberately denies the final power to compel arbitration.' " *Jacksonville Terminal Co.*, 394 U.S. at 378 (quoting *Florida East Coast Railway v. Brotherhood of Railroad Trainmen*, 336 F.2d 172, 181 (5th Cir. 1964), *cert. denied*, 379 U.S. 990 (1965)). This is not to say, however, that a disgruntled employer is free to use self-help measures to rid itself of a union or unnecessarily alter the employer-employee relationship. Unions and the employees they represent are similarly limited in the types of self-help measures they can employ. *See Jacksonville Terminal Co.*, 394 U.S. at 392 (recognizing that "parties who have unsuccessfully exhausted the Railway Labor Act's procedures for resolution of a major dispute [are allowed] to employ the full range of whatever peaceful economic power they can muster, so long as its use conflicts with no other obligation imposed by federal law"). *Cf. Brotherhood of Railway & Steamship Clerks v. Florida East Coast Railway*, 384 U.S. 238, 247 (1966) (noting that in a case where the collective bargaining agreement is still in effect that "[w]hile the carrier has the duty to make all reasonable efforts to continue its operations during a strike, its power to make new terms and conditions governing the new labor force is strictly confined, if the spirit of the Railway Labor Act is to be honored") (footnote omitted).

With respect to unions, the RLA provides specific statutory protections which ensure that an employer cannot implement measures under the guise of self-help which are intended solely to destroy a union's ability to represent its membership. *See* 45 U.S.C. § 151a(2) (one pur-

pose of the RLA is "to forbid any limitation on freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization") (1982).[7] For example, the Act provides that employee and employer representatives for collective bargaining purposes be chosen "by the respective parties without interference, influence, or coercion by either party." 45 U.S.C. § 152, Third. Similarly, "[e]mployees shall have the right to organize and bargain collectively through representatives of their own choosing." 45 U.S.C. § 152, Fourth. In order to protect this right, the RLA provides that management may not

> deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other con-

---

[7] We recognize that in *Burlington Northern Railroad, supra*, we stated that the "purposes laid out in § 151a are useful only in understanding the meaning of the terms that appear in the statute" and that "[t]hey are not warrants for inventing prohibitions the Railway Labor Act does not contain." Slip op. at 14. The instant case involves, as opposed to the situation in *Burlington*, specific statutory protections which limit the scope United's self-help measures could take. Accordingly, we need not rely on section 151a to derive limits to self-help, but rather can look to express statutory language. In so doing, we are free to examine section 151a, as we noted in *Burlington*, to facilitate our statutory interpretation.

> tributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions . . . .

Id. In the same way, the RLA also prohibits management from requiring "any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization." 45 U.S.C. § 152, Fifth.

In the present case, the problem we face is to ascertain whether the various self-help measures employed by both United and ALPA unlawfully impinged upon statutory protections provided under the RLA. At first glance, it may seem that this problem could be easily resolved; either an action is or is not in contravention of federal law. However, in reality, it is a difficult question to determine when, if ever, an otherwise legitimate self-help measure begins to impede upon a statutory protection. In implementing self-help measures to ensure the continuation of its operation during the strike, United necessarily acted, either intentionally or unintentionally, in ways that adversely affected ALPA members. Similarly, ALPA acted in ways which adversely affected United. In such a situation, it was inevitable that a clash occurred between United's right to self-help and ALPA members' right to organize without being coerced or influenced. Our function now is to determine whether the appropriate balance between competing rights was achieved. *Cf. Empresa Ecuatoriana De Aviacion S.A. v. District Lodge No. 100*, 690 F.2d 838, 844-45 (11th Cir. 1982) (upholding in a minor dispute case, the district court's conclusion that "the carrier struck a proper balance between its twin obligations to serve the public and to attempt reasonably to maintain the employer-employee relationship"), *cert. dismissed*, 463 U.S. 1250 (1983).

The first issue we reach in this regard is whether the district court erred in concluding that United's rebidding of the airline violated the RLA. The district court found that United's rebid was unlawful since the airline "failed to justify the rebid as reasonably necessary for its opera-

tions during the strike" and because United's actions were motivated by anti-union considerations.

As the district court noted, it is well-established under the RLA that once the mediation and arbitration step has been completed, albeit unsuccessfully, both sides are free to engage in self-help as a means of continuing operations as well as a means of inducing a settlement. As a result, United was free within certain bounds to take the steps necessary to continue flying; the airline's right to employ self-help measures during the strike stopped, however, where its duties under the RLA and other laws began. *See Jacksonville Terminal Co.*, 394 U.S. at 392.

ALPA contends, citing 45 U.S.C. § 152, Third and Fourth, that the RLA prohibits employers from retaliating against employees for engaging in a lawful strike. Although we agree with this proposition as a general matter, our analysis cannot end here. The real issue is what constitutes unlawful retaliation. It goes without saying that since the Act provides for the use of self-help by an employer, all measures of self-help cannot constitute unlawful retaliation. To assist us in resolving this issue ALPA suggests that we refer, as the district court did, to the National Labor Relations Act (the "NLRA" or the "Wagner Act"), 29 U.S.C. § 151 *et seq.* (1982) "as a definitive guide to contemporary meaning" of identical terms used both in the NLRA and the RLA. ALPA contends that the similarity between the relevant provisions of the NLRA and the RLA mandates that the two statutes be generally interpreted in the same way.

United, on the other hand, argues that the NLRA and the RLA were never intended by Congress to be applied in similar fashions, an intent the courts, United contends, have respected. The Second Circuit has noted that the NLRA and the RLA were directed at remedying problems in different arenas where the relative economic power of the participant labor organizations vis-a-vis the employer varied:

> The special situation in the railroad industry, where strong unions and management had become used to dealing with each other, differed vitally from the host of problems at which the Wagner Act was aimed—businesses of every size and description, many with a history of strong anti-union bias and with ample opportunity for strong-arm tactics. It was thus natural that the Wagner Act should stress administrative adjudication whereas the earlier Railway Labor Act relied primarily on mediation.

Ruby v. American Airlines, Inc., 323 F.2d 248, 256 (2d Cir. 1963), *cert. denied*, 376 U.S. 913 (1964). *See Klemens v. Air Line Pilots Association, International*, 736 F.2d 491, 496 (9th Cir.) (noting that "[t]he NLRA and the RLA are fundamentally different"), *cert. denied*, 105 S. Ct. 435 (1984). Indeed, even the Supreme Court has concluded that "the National Labor Relations Act cannot be imported wholesale into the railway labor arena. Even rough analogies must be drawn circumspectly, with due regard for the many differences between the statutory schemes." *Jacksonville Terminal Co.*, 394 U.S. at 383 (footnote omitted). *Accord Chicago & North Western Railway v. United Transportation Union*, 402 U.S. at 579 n.11 (1971) (noting that "all parallels between the NLRA and the [RLA] . . . should be drawn with the utmost care"); *Ruby*, 323 F.2d at 256 ("the claim that the courts should do under the Railway Labor Act what Congress directed the NLRB to do under the National Labor Relations Act not only flies in the face of the difference in the language and scheme of the two statutes but ignores the diverse problems to which they were addressed").

Although it is clear that comparisons between the NLRA and the RLA must be carefully constructed, we nonetheless believe that the district court did not err, though relying on cases interpreting the NLRA, in concluding that United's implementation of the rebid was unlawful. In its ruling, the district court relied heavily upon the Supreme Court's decision in *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963). In *Erie Resistor*, the Court

held, even in the absence of a showing of illegal motive on the part of the employer, that it was an unfair labor practice under section 8(a) of the NLRA, 29 U.S.C. § 158 (1982), for an employer to give preference to replacements and nonstriking workers by giving them a twenty-year seniority credit relative to those workers who refused to cross the picket line. 373 U.S. at 236-37.

Although ALPA argues that *Erie Resistor* controls here, and that any type of super-seniority serves necessarily to undermine a union in contravention of the RLA, we need not reach that issue.[8] First, as noted above, simply because a practice is deemed unlawful under the NLRA does not automatically translate into a finding that the same practice is unlawful under the RLA. Second, and more important, are the findings made by the district court that the rebid procedure employed by United was not needed for it to continue during the strike and that the rebid was motivated by anti-union sentiment.

With respect to the business necessity for the rebid, it is uncontested that throughout the strike no nonstriker actually filled a vacancy that was awarded during the rebid. Yet, at the same time, the rebid significantly harmed those pilots who refused to cross the picket line. For example, Group of 500 members who crossed the picket line were able to gain between 2,960 and 5,090 places on the seniority list in bidding for DC-10 captain positions. In some cases this represented a jump in seniority of between 19 to 29 years. The jump in seniority for B-727 captains bidding for DC-10 or B-747 captain positions was five years (from B-727 captain median seniority to DC-10 captain lowest seniority) and a $24,000 pay increase.

In *Brotherhood of Railway & Steamship Clerks v. Florida East Coast Railway, supra*, the Supreme Court held that changes in the relationship between employer and employee that result from self-help measures implemented

[8] Because of our resolution of this issue, we do not consider United's argument that the rebid did not involve the type of super-seniority which the Court found unlawful in *Erie Resistor*.

must be shown to be reasonably necessary to keep the operation of the carrier ongoing in order to be lawful under the RLA. 384 U.S. at 248. "[T]he burden is on the carrier to show [that] the need for any alteration of" the collective bargaining agreement is necessary "in order to maintain that continuity of operation that the law requires of it." *Id.* Although *Brotherhood of Railway & Steamship Clerks v. Florida East Coast Railway* arose in a situation where the collective bargaining agreement was still in effect, we see no reason to depart totally in the post-contract period from its holding that some showing of a reasonable business justification is required before a court will allow an employer to implement self-help measures which, whether intentional or not on their face, undercut the union's ability protected by the RLA to function as an effective representative for its members. *See Erie Resistor*, 373 U.S. at 228 (noting that "[t]he employer . . . must be held to intend the very consequences which foreseeably and inescapably flow from his actions"). *But cf. Belknap, Inc. v. Hale*, 463 U.S. 491, 504-05 n.8 (1983) (discussing validity of requirement that permanent replacements can only be hired when business necessity is shown). The provisions of the RLA that seek to protect employees' rights to join and participate in a union would seem to require nothing less.

In the present case, although striking ALPA members would be harmed by the rebid, United now seeks to impose it on its pilots solely in order to keep its word to those pilots who crossed the picket line. United does not contest the district court's conclusion that the rebid was not necessary to ensure the continuation of the airline's operations during the short-lived strike that actually took place, and, in fact, concedes that the rebid had little impact upon pilots in terms of inducing them to report to work "as demonstrated by the pilots' solidarity in honoring the picket line." (Defendant-Appellant's Reply Br. at 50 n.46). From this lack of efficacy it is at least arguable that the rebid was devoid of any business justification whatsoever, and we could accordingly conclude that United's actions were merely meant to coerce pilots

to abandon their membership in the union in violation of the RLA.

In the typical situation, however, the failure of an allegedly lawful self-help measure to effectuate a desired result may well not be a sufficient basis upon which to conclude that the employer's motive in implementing the measure was to destroy the employees' union. Indeed, in the present case, United argues that the rebid was not only an attempt to induce pilots to cross the picket line, but was also the first step in rebuilding the airline's pilot structure. United contends that by rebidding the airline early in the strike it was in a better position to determine its future needs so that pilots could be trained for vacant positions in the event the strike were to continue for a long time. If this were all that the record revealed, we would be inclined to agree with United that its rebid was necessary to keep the airline flying.

The record to the contrary shows, however, as the district court concluded, that United's actions with respect to the rebid were taken more out of spite for ALPA than in hopes of rebuilding the airline.[9] *See Erie Resistor*, 373 U.S. at 228 ("Conduct which on its face appears to serve legitimate business ends . . . is wholly impeached by the showing of an intent to encroach upon protected rights. The employer's claim of legitimacy is totally dispelled.") (footnote omitted). The trial court found that ALPA "established specific evidence of United's intent of coercion and discrimination against union membership by virtue of the rebid procedure." 614 F. Supp. at 1046. In fact, the court noted that United's rebid was part of a plan "which was intended to break the strike by causing a 'stampede' of striking pilots to cross the picket line." *Id.* The record further indicates that when a United official presented the rebid plan to a meeting of the airline's corporate officers, no business justification was given for the plan. Even

[9] Whether or not a showing of business necessity could legitimize the rebid as a lawful self-help measure in the absence of anti-union motivation is a question we leave for another day.

United Chairman Ferris conceded that the rebid plan was meant to cause " 'penalty and harm and hurt' " and if the pilots refused to work " 'the harm will hit, and the union will never negotiate that away.' " 614 F. Supp. at 1031.

United argues that the district court erred in inferring that the rebid was motivated by anti-union sentiment. We disagree. Our review of the record indicates that the rebid was an attempt by United either to destroy the union or at the very least discourage union membership. In other words, we do not believe, contrary to United's position, that the trial court's findings with respect to anti-union motivation are clearly erroneous and, therefore, they must be upheld.[10]

The existence of anti-union motivation, by itself, provides a sufficient basis upon which to uphold the district court's decision with respect to the rebid procedure. An employer is not free under the RLA, in the guise of self-help, to act "to influence or coerce employees in an effort to induce them . . . not to join or remain members of any labor organization." 45 U.S.C. § 152, Fourth. *Cf. Conrad v. Delta Air Lines, Inc.*, 494 F.2d 914, 918 (7th Cir. 1974) (noting that under the RLA "[a]nti-union motivation invalidates even a discharge which could be justified on independent grounds"). Although United had the right to employ self-help, that right was limited. Under the circumstances presented here, we can only conclude that, in the balance between United's right to self-help and its duty to respect ALPA's right to exist and function, the district court did not err in finding that United's actions regarding the rebid violated the RLA.[11]

---

[10] Although the district court characterized its findings of anti-union motivation as conclusions of law, in essence, they are factual findings and hence are reviewed under the clearly erroneous standard.

[11] Because we conclude that United's rebid was motivated by anti-union sentiment, we have no need to consider United's

(Footnote continued on following page)

Even conceding, *arguendo*, that its rebid violated the RLA, United argues that ALPA is nonetheless ineligible for the injunctive relief the district court granted because of "unclean hands." United contends that ALPA's bargaining to impasse with respect to and conditioning ratification of the new agreement upon United reaching a back-to-work agreement with the flight attendants, ALPA's photographing of nonstriking pilots, and its use of economic warfare during the cooling-off period constitute "unclean hands" thereby disqualifying the union from receiving injunctive relief. United argues that these actions: (1) violated ALPA's duty to bargain in good faith under section 2, First of the RLA, 45 U.S.C. § 152, First; (2) constituted unlawful bad faith and coercive acts; and (3) violated the RLA's status quo provisions forbidding use of economic warfare prior to the end of the cooling-off period. The district court concluded, however, that United failed to establish that any of its affirmative defenses were a bar to ALPA receiving injunctive relief.

In making its ruling, the district court correctly noted that any party seeking injunctive relief under the RLA must comply with section 8 of the Norris-LaGuardia Act, 28 U.S.C. § 108 (1982).[12] *See Brotherhood of Railroad Trainmen, Enterprise Lodge, No. 27 v. Toledo, Peoria &*

---

[11] *continued*
arguments: (1) that the rebid was nothing more than a means of introducing permanent replacements into the system; (2) that the rebid was lawful since the collective bargaining agreement had expired and with it the pilots' seniority rights; and (3) that the rebid was consistent with the RLA since a bargaining impasse had been reached and United was therefore free to effect changes in its agreement with ALPA. Even if we assumed that these arguments had merit and that United's actions would, in the normal case, be lawful, the existence of anti-union motivation in implementing the rebid still constitutes a violation of the RLA sufficient to uphold the district court's decision.

[12] United's sole contention is that ALPA is ineligible for injunctive relief under the Norris-LaGuardia Act on the basis of "unclean hands."

Western Railroad, 321 U.S. 50, 56 (1944). Pursuant to section 8

> [n]o restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration.

29 U.S.C. § 108 (1982). In *Brotherhood of Railroad Trainmen*, the Supreme Court noted that in general terms section 8 places two requirements on a party seeking injunctive relief for violations under the RLA: "(1) to comply with any obligation imposed by law [and] (2) to make every reasonable effort to settle the dispute . . . ." 321 U.S. at 56-57. Failure to fulfill either one or both of these requirements will generally result in the complainant being denied relief. *Id.* at 57.[13]

Although the Court's decision in *Brotherhood of Railroad Trainmen* could be construed as implying an absolute duty to fulfill the two prerequisites before injunctive relief could be forthcoming, in limited circumstances courts have refused such a mechanical approach. *See Illinois Central Railroad v. Brotherhood of Railroad Trainmen*, 398 F.2d 973 (7th Cir. 1968) (per curiam). The Norris-LaGuardia Act has never been construed to bar an injunctive remedy when such relief is necessary to reach important objec-

---

[13] United argued in a pretrial motion that ALPA violated the settlement component of section 8 by failing to accept NMB's proffer of arbitration. United had likewise declined the invitation to arbitrate the dispute in the prestrike period. The district court denied United's motion concluding that ALPA made every reasonable effort to settle the dispute. (The district court's opinion is reported at 610 F. Supp. 243). United does not appeal this ruling. Accordingly, we look only at United's contention that ALPA failed to comply with legal obligations thereby rendering the union ineligible for injunctive relief pursuant to section 8.

tives of federal labor law. *See Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 251-52 (1970). Rather, where parties seek injunctive relief under the RLA, the proper role of the courts is to ensure that the "obvious purpose" of both the RLA and the Norris-LaGuardia Act is preserved. *Brotherhood of Railroad Trainmen v. Chicago River & Indiana Railroad*, 353 U.S. 30, 40 (1957). *See Chicago & North Western Railway v. United Transportation Union*, 402 U.S. at 583; *Virginian Railway v. System Federation No. 40*, 300 U.S. 515, 563 (1937).

As a result, in dealing with the legal obligations component of section 8 as it relates to the RLA, courts have tended to weigh the competing equities to determine whether applying section 8's bar to injunctive relief would serve to further underlying purposes of both the RLA and the Norris-LaGuardia Act. In *Illinois Central Railroad v. Brotherhood of Railroad Trainmen, supra*, for example, we declined to employ section 8 as a bar to injunctive relief where the employer, who had arguably violated the status quo provisions of the RLA, was seeking a strike injunction. As we noted in that case:

> [E]ven if the Brotherhood were correct in contending that the railroad lacked clean hands, Section 8 of the Norris-LaGuardia Act would not of necessity preclude the issuance of an injunction against a strike by the Brotherhood. . . . "It may be that in a particular case the District Court might conclude that the imperatives of the Railway Labor Act override Section 8—a statutory focusing so to speak of an equity approach whereby lack of clean hands may be overcome by a balancing of interests, particularly where it is the public interest involved."

398 F.2d at 975-76 (quoting *Brotherhood of Railroad Trainmen v. Akron & Barberton Belt Railroad*, 385 F.2d 581, 614 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 923 (1968)). *See Chicago & North Western Transportation Co. v. United Transportation Union*, 495 F. Supp. 448, 452 (N.D. Ill. 1980), *aff'd*, 656 F.2d 274 (7th Cir. 1981).

With these principles in mind, we proceed to an examination of ALPA's conduct which United claims should bar the union from receiving injunctive relief. The first action United complains of is ALPA's bargaining tactics relative to the AFA's back-to-work agreement. United maintains, relying in part on *NLRB v. Wooster Division of Borg-Warner Corp.*, 356 U.S. 342, 349 (1958), that a party such as ALPA may not, in good faith, bargain to impasse over permissive subjects of collective bargaining. In *Borg-Warner*, the Supreme Court ruled that under the NLRA parties are entitled to bargain to impasse over mandatory subjects of collective bargaining, *i.e.*, wages, hours, and other terms and conditions of employment, without violating their duty to bargain in good faith. With respect to other issues, *i.e.*, permissive or non-mandatory subjects, parties are not free to insist upon their position to impasse without violating their good faith bargaining duty. In other words, "good faith does not license the employer to refuse to enter into agreements on the ground that they do not include some proposal which is not a mandatory subject of bargaining." *Id.* In the instant case, United alleges that ALPA violated its duty to bargain under section 2, First of the RLA when it bargained to impasse over the issue of AFA's back-to-work agreement. In short, United is contending that ALPA unlawfully bargained to impasse over a non-mandatory subject.

Although United fails to cite any decision in which a court applied the *Borg-Warner* analysis in a case arising under the RLA, our own research indicates that the mandatory-permissive distinction is applicable under section 2, First. *See Japan Air Lines Co. v. International Association of Machinists & Aerospace Workers*, 538 F.2d 46, 51-52 (2d Cir. 1976) (appellate court affirming district court's application of mandatory-permissive distinction in case arising under RLA and rejecting union argument that labor and management should meet and negotiate with respect to any proposal advanced by either party); *Elgin, Joliet & Eastern Railway v. Brotherhood of Railroad Trainmen,*

302 F.2d 540, 543-44 (7th Cir.) (discussion of whether pension agreements constitute subjects of mandatory collective bargaining under the RLA), *cert. denied*, 371 U.S. 823 (1962). *Cf. First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 686 n.23 (1981) (noting that "[t]he mandatory scope of bargaining under the Railway Labor Act . . . [is] not coextensive with the National Labor Relations Act"). Indeed, the use of the mandatory-permissive distinction under the RLA is entirely consistent with its statutory framework. Section 2, First provides that parties "exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions." 45 U.S.C. § 152, First (1982). It is self-evident, therefore, that, unless parties are to be required to bargain over every issue, *see Japan Air Lines*, 538 F.2d at 51, the mandatory subjects under the RLA must be limited to those enumerated in the Act. From this it logically follows, that, given the parties' duty to exert every reasonable effort to reach agreement on these mandatory subjects, a refusal to bargain over these issues until an agreement is reached on a non-mandatory subject would violate a party's duty to bargain under section 2, First.

In the present case, ALPA argues that the issue of the AFA agreement was in fact a mandatory subject of bargaining and hence, even if we were to find that a bargaining impasse was reached on this issue, no violation of the bargaining duty occurred. However, we need not reach ALPA's argument since we conclude that, contrary to United's position, the district court did not err in finding that ALPA did not bargain in bad faith with respect to the AFA agreement. First, the district court concluded that United failed to present any evidence to support its "contention that ALPA sought to bargain over the provisions of a back-to-work agreement for flight attendants who honored ALPA's picket line." 614 F. Supp. at 1048. Our review of the record supports this finding and we hold that the district court's conclusion that no bargaining impasse was reached regarding the provisions of the

AFA agreement must stand since it is not clearly erroneous.[14]

Although finding no bargaining impasse with respect to the provisions of the AFA back-to-work agreement, the district court did note that ALPA informed United that it would honor its commitment not to ratify an agreement with United until the flight attendants had negotiated their back-to-work agreement. United contends that by conditioning the ratification of its own agreement upon AFA reaching a satisfactory agreement, ALPA violated its duty to bargain by insisting on a permissive subject of bargaining.

We recognize that under certain circumstances such a commitment, if carried out to the letter, could constitute a violation of the employees' duty to bargain in good faith. *NLRB v. South Atlantic & Gulf Coast District International Longshoremen's Association*, 443 F.2d 218 (5th Cir. 1971), involved, for example, a longshoremen's strike in which the picket line was honored by members of another union. Although the longshoremen eventually returned to work, they refused to do so until the employers reached an accord with the union that had respected the picket line. The Fifth Circuit held that the actions of the longshoremen violated their duty to bargain under the NLRA. In so doing, the court noted:

---

[14] In the district court, United also argued that ALPA impermissibly bargained to impasse over issues involving the Group of 500 and Training Check Airmen ("TCAs"). On appeal, United does not raise any issue with respect to an unlawful impasse over issues relating to the Group of 500. In a footnote, United does contend that ALPA's insistence on bargaining over the TCAs was unlawful. United maintains that the TCAs are management personnel and are hence excluded from protections afforded other employees under the RLA. Even if we assume this characterization is correct, United nonetheless fails to substantiate its claim that ALPA unlawfully bargained to impasse with respect to the TCAs. Without something more, we see no need to question the district court's finding that no impasse was reached on this issue.

> When parties to collective bargaining reach a final agreement on the terms of the agreement, they have a duty to execute that agreement by written contract, and this duty may not be avoided by injecting extraneous issues into the negotiations. . . . [A]s put by the trial examiner: ". . . A union enjoying statutory status as exclusive representative of all employees within a bargaining unit may not unilaterally extend the scope of its agency authority and insist to impasse upon the employer's capitulation to the demands of other employees and other unions."

Id. at 220 (citations omitted).

Similarly, in *Standard Oil Co. v. NLRB*, 322 F.2d 40 (4th Cir. 1963), the court held that the union violated its duty to bargain by refusing to execute an agreement with its employer. In so holding, the court noted with approval that the NLRB had concluded that the union's refusal "was unrelated to any dissatisfaction with the contract terms themselves but was based upon the [union's] unilateral decision to approve no agreement with the Company until negotiations were satisfactorily concluded by another local." *Id.* at 45.

Although United contends otherwise, we do not believe that the district court erred in finding that ALPA's behavior with respect to the AFA was not in contravention of its duty to bargain in good faith. Unlike the situation in both *South Atlantic* and *Standard Oil*, ALPA, though stating that it would not ratify its agreement until an agreement was reached with AFA, never carried out its threat. Indeed, AFA released ALPA from its obligation prior to the time ALPA was faced with the prospect of ratifying a new agreement with United. Moreover, ALPA never conditioned its negotiations upon United's reaching a satisfactory back-to-work agreement with AFA; rather, ALPA initially stated only that it would not ratify a tentative agreement once one was reached prior to the time that AFA reached an accord with United. Since ratification of the agreement between ALPA and United was

never hindered by ALPA's promise to AFA, we find that ALPA's actions with respect to this matter were not in violation of its duty to bargain in good faith.

The next action United claims gave ALPA unclean hands was the union's photographing of nonstriking pilots as they crossed picket lines and as they performed their duties during the strike. United argues that this action constituted unlawful coercion under the RLA. Although United raises this issue in its brief, it cites no authority interpreting the RLA to support its position nor does it even discuss the issue apart from its bare allegation that the conduct was unlawful. Nonetheless, it is generally acknowledged that it is unlawful for an employer under the NLRA to take photographs of picket line activity if the tendency of such action is to interfere with, restrain, or coerce employees engaged in protected concerted action. *See Flambeau Plastics Corp.*, 167 N.L.R.B. 735, 742-43 (1967), *enf'd*, 401 F.2d 128 (7th Cir. 1968), *cert. denied*, 393 U.S. 1019 (1969). At the same time, "an employer may validly photograph a picket line to substantiate picket line misconduct or to gather evidence for use in injunctive or unfair labor practice proceedings." *Road Sprinkler Fitters Local Union No. 669 v. NLRB*, 681 F.2d 11, 19 (D.C. Cir. 1982) (citing *NLRB v. Colonial Haven Nursing Home, Inc.*, 542 F.2d 691, 700-02 (7th Cir. 1976)), *cert. denied*, 459 U.S. 1178 (1983). Although these cases arise under the NLRA, we see no reason why they do not apply equally as well to the RLA.

Simply recognizing that photographing picket lines may constitute unlawful conduct does not end our inquiry, however. The present case arises in a different context than those cited above. In both *Flambeau Plastics* and *Road Sprinkler Fitters*, it was the employers, as opposed to the employees as in the instant case, who were taking pictures in an attempt at coercion. Whether or not the RLA would protect an employee against coercive union action is a question neither United nor ALPA address. ALPA contends that we need not even reach that issue since

its photography was solely a legitimate attempt to ascertain the extent of the strike by determining the number of pilots who crossed the picket line. Indeed, ALPA argues that United failed to present any evidence that the photography was intended to or had the effect of intimidating pilots who continued to fly for the airline.

In the end, we have no need to resolve either the issue of whether ALPA was barred from coercing its members or the issue of whether ALPA acted legitimately since even if we assume that ALPA's actions were unlawful, we still find that the district court did not err in granting injunctive relief. As noted above, courts have recognized that in the appropriate case the public interest imperatives of the RLA may override the Norris-LaGuardia Act's prohibition against granting injunctive relief to a party with unclean hands. In the present case, there was no evidence that ALPA's conduct harmed United. Moreover, the district court concluded, and we agree, that a denial of injunctive relief as it relates to the rebid procedure would only promote United's self-interest, while substantially harming those striking pilots affected by the unlawful rebid. Given the equities of the situation and since we have already concluded that the rebid is violative of the RLA, it would be an anomalous situation if the Norris-LaGuardia Act could be interposed to block a court from enjoining the implementation of an unlawful plan in this case. Without injunctive relief, United would seemingly be free to institute the rebid with impunity even though this court concludes that the contemplated action is unlawful. In such a situation, the Norris-LaGuardia Act cannot reasonably be seen to bar injunctive relief if the obvious purpose of the RLA is to be vindicated. *See Empresa Ecuatoriana De Aviacion*, 690 F.2d at 847 (noting that "a court must keep central to its consideration the national policies underlying the Railway Labor Act and not individual feelings of judges about who has and who has not behaved badly"). Accordingly, we conclude that the district court did not err in granting injunctive relief even though ALPA may have engaged in potentially unlawful photography.

The final category of conduct United claims bars ALPA from receiving injunctive relief encompasses several self-help measures that United alleges were taken prior to the exhaustion of the RLA's mandated procedures. United argues, therefore, that ALPA violated the status quo requirement of the RLA.

The first self-help measure United raises as a bar to equitable relief is ALPA's allegedly abusive use of sick leave. United contends that member pilots used their accumulated sick leave, although they were not ill, as an economic weapon against the airline in the pre-strike period. The district court concluded, however, that no status quo violation had been proven since United conceded that it had no evidence showing ALPA involvement in any plan to abuse sick leave. In fact, at trial, United failed to identify even a single pilot who had taken sick leave without being actually sick.

We have no doubt that a concerted union plan to abuse sick leave as an economic weapon in the pre-strike period could be found, in the appropriate circumstances, violative of the RLA. *See Texas International Airlines v. Air Line Pilots Association*, 518 F. Supp. 203 (S.D. Tex. 1981). Nonetheless, as the district court noted, section 6 of the Norris-LaGuardia Act limits the extent of a union's potential liability:

> No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof.

29 U.S.C. § 106 (1982). Under this statute, the district court's finding that ALPA was not involved in the alleged abuse of sick leave would generally end the discussion even if United was able to identify individual pilots who did abuse the system.

United, however, contends otherwise, relying on *Pan American World Airways, Inc. v. Independent Union of Flight Attendants*, 93 Lab. Cas. (CCH) ¶ 13,307, 20,035 (S.D.N.Y. July 20, 1981). In *Pan American*, the court relied upon statistical evidence which revealed a "dramatic increase" in sick leave absences. *Id.* at 20,036. Relying in part on this evidence the court issued an injunction against the "sickout" concluding that there is a serious question regarding whether the union had violated its obligations under the RLA "by encouraging, or at least making no reasonable efforts to discourage" abuse of sick leave by union members. *Id.* at 20,039. United, noting that the number of days of sick leave used by its pilots had doubled in the first four months of 1985, as compared with the same period in 1984, argues that such statistical evidence is sufficient to implicate ALPA in the alleged sick leave abuse scheme. We disagree.

In order to establish that section 6 of the Norris-LaGuardia Act does not insulate ALPA, United was required to show by "clear proof" ALPA's involvement with the sick leave abuse. As the district court noted, the clear proof standard required United to prove by clear and convincing evidence, as opposed to a preponderance, ALPA's involvement. *See United Mine Workers v. Gibbs*, 383 U.S. 715, 737 (1966). After reviewing the evidence, the district court found that ALPA was not engaged in promoting the abusive use of sick leave and United has failed to convince us that this finding is clearly erroneous. United, relying on *Pan American*, argues at some length that the mere existence of statistical data showing an increased use of sick leave is sufficient to establish union involvement in the scheme. In *Pan American*, however, there was much additional evidence indicating union involvement in the sickout apart from the statistical evidence including reports in the media and a notice posted on the union bulletin board. United's reliance on *Pan American* to support its proposition that statistical evidence standing alone is sufficient to overcome the trial court's finding is misplaced.

United also argues that the campaign to inform travel agents of an impending strike and the informational picketing of the World Trade Conference should bar ALPA from receiving injunctive relief. The district court refused to bar relief on these grounds concluding that such actions failed to rise to the level of self-help whose implementation would otherwise be prohibited in the pre-strike cooling-off period. The trial court, relying on the Supreme Court's decision in *Detroit & Toledo Shore Line Railroad, supra*, found that the status quo provisions of the RLA are only intended to prevent a union strike or to keep management from taking actions that would induce a strike. In *Detroit & Toledo Shore Line Railroad* the Court ruled that the status quo requirement of the RLA was designed "to prevent the union from striking and management from doing anything that would justify a strike." 396 U.S. at 150.

There is no question that the RLA's status quo requirement is intended to prevent a strike during the cooling-off period. *See Manning v. American Airlines, Inc.*, 329 F.2d 32, 35 (2d Cir.) (noting that the status quo requirement is "to prevent rocking of the boat by either side until the procedures of the Railroad Labor Act [have been] exhausted"), *cert. denied*, 379 U.S. 817 (1964); *American Airlines, Inc. v. Transport Workers Union*, 57 L.R.R.M. (BNA) 2484, 2487 (S.D.N.Y. Apr. 17, 1964) ("The resort to economic self-help during the pendency of the procedures of the Railway Labor Act, by either party to a dispute, is inconsistent with the requirements of that Act."). To avoid any misunderstanding which may arise from a cursory reading of the district court's opinion, we must also note that union conduct, which may not be able to be classified literally as a strike, but which has the consequences of a strike, is also prohibited during the cooling-off period. *See Detroit & Toledo Shore Line Railroad*, 396 U.S. at 150, 152-53. As the court in *United Air Lines, Inc. v. International Association of Machinists*, 54 L.R.R.M. (BNA) 2154 (N.D. Ill. Sept. 5, 1963), noted:

> The concerted refusal of overtime, slow-downs, sit-ins, strikes and other harassments by [the union and

> its members] is a violation of the duty imposed by the Railway Labor Act [*i.e.*, section 2, First] to exert every reasonable effort to settle all disputes in order to avoid any interruption to commerce or to the operation of any carrier.

Id. at 2156. *See Detroit & Toledo Shore Line Railroad*, 396 U.S. at 152 (status quo provisions of the RLA "together with § 2 First, form an integrated, harmonious scheme for preserving the status quo from the beginning of the major dispute through the final 30-day 'cooling-off' period"). *See also Long Island Railroad Co. v. System Federation, No. 156*, 289 F. Supp. 119, 125 (E.D.N.Y. 1968).

United argues, relying on *American Airlines, Inc. v. Transport Workers Union, supra*, that ALPA's pre-strike discussions with travel agents and picketing constituted self-help which had the consequences of a strike and are therefore unlawful. In *American Airlines*, the district court enjoined the union from engaging in self-help during the pre-strike period which the court found to be violative of the RLA's status quo provisions. It is true, as United argues, that part of the union's concerted action in *American Airlines* involved picketing of the employer airline. However, the union's actions in that case went far beyond mere picketing. The district court found that the union and its members had "engaged in a series of concerted work stoppages and mass demonstrations" against the airline which resulted in flights involving over 1,500 passengers being cancelled or delayed. 57 L.R.R.M. at 2485. Air cargo, air express, and U.S. mail were also delayed as a result of the union activity. *Id.* at 2486. As a consequence of these actions, the district court found that the airline had suffered "a direct loss of revenue" and goodwill, *id.*, and, accordingly, enjoined the union from engaging in such further pre-strike activity. *Id.* at 2488.

In the present case, unlike *American Airlines*, there was no evidence presented which would indicate that United was harmed by the actions of ALPA during the cooling-off

period. Although we do not condone the actions of ALPA in attempting to undermine public confidence in United's ability to continue to provide service, we do not believe that these actions had the consequences of a strike so as to violate the status quo provisions of the RLA. There were no work stoppages or mass demonstrations as a result of these actions; nor has United provided any evidence that it suffered any resulting economic harm. We therefore agree with the district court that ALPA's actions were not unlawful and hence not a bar to injunctive relief.[15]

III.

The next issue we deal with is ALPA's contention that the district court erred in ruling that United's grant of guaranteed salaries for fleet-qualified replacements[16] was lawful under the RLA. As we noted above, United offered fleet-qualified captains and first officers $75,000 per year and $50,000 per year respectively to serve as permanent strike replacements, guaranteeing the salaries even if the pilots were ultimately demoted to second officers once the strike ended. After the strike was settled, this demotion

---

[15] In the alternative, the district court ruled, relying on our decision in *International Union, Allied Industrial Workers of America v. Local Union No. 589*, 693 F.2d 666 (7th Cir. 1982), that injunctive relief will be barred only where there is a direct nexus between the bad conduct alleged and the act sought to be enjoined. The court, concluding that there was no direct nexus between ALPA's conduct and the rebid procedure, ruled that United had failed to show that the unclean hands doctrine would even be applicable to this case. Because of our resolution of the issue, we do not reach United's argument that the district court's application of the direct nexus test is neither supported by *International Union* nor otherwise appropriate in this case.

[16] The term "fleet-qualified replacements" refers to pilots who were, in most instances, flying for other airlines when ALPA's strike against United began. The district court found that when hired these pilots were ready to serve as captains or first officers on the type of jets flown by United.

did in fact take place. The new collective bargaining agreement provided that all striking pilots be returned to their pre-strike positions and, accordingly, all of their replacements were removed from service and began training as second officers.

ALPA argued in the district court that the replacement program operated as an unlawful sanction against striking pilots, noting that the replacement pilots serving as second officers would be receiving salaries in excess of other second officers under the terms of the new collective bargaining agreement. The district court rejected ALPA's argument noting: (1) that "the pay scales [offered the replacement pilots] were reasonable considering the pilots' experience and qualifications;" (2) that United's use of the replacement program was soundly based since the strike made it necessary for United "to offer a pay scheme sufficient to attract qualified replacements;" and (3) that the hiring of replacements at guaranteed salary levels "does not disadvantage striking pilots . . . ." 614 F. Supp. at 1047. ALPA appeals arguing that United's action both violated its duty to bargain in good faith since United failed to negotiate this issue with the union, *see* 45 U.S.C. § 152, First, and constituted unlawful discriminatory conduct by an employer. *See* 45 U.S.C. § 152, Fourth.

There is no question that an employer has the right to hire permanent replacements in the event of a strike. *See Empresa Ecuatoriana De Aviacion*, 690 F.2d at 844. *See also NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345 (1938) (providing for hiring of permanent strike replacements under the NLRA); *Giddings & Lewis, Inc. v. NLRB*, 675 F.2d 926 (7th Cir. 1982); *NLRB v. Mars Sales & Equipment Co.*, 626 F.2d 567 (7th Cir. 1980). ALPA does not challenge United's right to hire replacement pilots. Nor does ALPA contest United's assertion that the airline could not have secured the necessary captains and first officers needed to continue operations during the strike without the inducement of the guaranteed salaries. What ALPA does challenge is United's purported

failure to negotiate the salaries of the replacement pilots with the union prior to hiring. ALPA, relying on *NLRB v. Katz*, 369 U.S. 736 (1962), contends that, similar to the situation under the NLRA, an employer's unilateral decision to increase wages without prior negotiations constitutes a *per se* violation of the duty to bargain in good faith under the RLA. We find this argument without merit. Even if we were to assume that *Katz* is applicable to cases arising under the RLA, it nonetheless has no relevance to an employer's dealings with potential employees who may be hired to replace striking workers. As we noted in *Capitol-Husting Co. v. NLRB*, 671 F.2d 237, 246 (7th Cir. 1982), "[i]t is settled that this duty [to bargain] does not extend to the terms and conditions of employment for replacements of striking employees."

Even conceding that it generally has no right to negotiate with respect to salaries paid permanent replacement pilots, ALPA argues that United violated its duty to bargain in good faith by offering salaries to these replacements that were in excess of those offered to union members. *See Local 259, United Automobile, Aerospace and Agricultural Implement Workers of America*, 776 F.2d 23, 28 (2d Cir. 1985); *Burlington Homes, Inc.*, 246 N.L.R.B. 1029, 1030, 1040 (1979) (concluding that employer's offer of a higher starting wage to strike replacements constituted a violation of the NLRA). In essence, ALPA's argument is two-fold. First, that United generally offered the replacement pilots who were ultimately reassigned to second officer status more money than it offered incumbent second officers prior to the strike. ALPA apparently contends that we should consider the hiring of the replacement pilots as simply the employment of additional second officers. It would then follow that United offered its replacement second officers more money than was offered its incumbent second officers, a practice which ALPA contends violated United's duty to bargain in good faith. We find ALPA's argument unpersuasive. At the time that the replacement pilots were hired, they were not hired as second officers, but rather as captains and

first officers. Under these circumstances, the proper salary comparison to make is between the replacement captain and first officer salaries and incumbent United captain and first officer salaries. Our review of the record indicates that the salaries paid replacements were less than those offered similarly situated incumbent pilots prior to the strike. On this point, therefore, we need not reach ALPA's contention that United's offers to replacements exceeded offers to incumbent pilots thereby violating the airline's duty to bargain in good faith.

Nor is our analysis affected by the fact that the replacements who were hired as captains and first officers at guaranteed salaries were later reassigned to second officer status. The relevant point of comparison is at the time when United hired the replacement pilots. At that point, the salary offers made to the replacement captains and first officers were less than the proposals made to similarly situated incumbent pilots. ALPA's contention that the replacements were offered more money to serve in similar positions is simply misplaced.

The second prong of ALPA's argument is that the proper point of reference with respect to the replacement pilots' salaries is the new-hire pay scale proposed by United as opposed to the salaries United was offering its incumbent pilots. ALPA is correct in noting that in most instances the salaries proposed by United for new hires were less than those offered the replacement pilots. However, this is irrelevant for purposes of the present case. The cases ALPA cites involve situations in which incumbent employees were offered less money than was ultimately paid to permanent strike replacements. In the present case, conversely, the replacement pilots were paid less than the salaries offered incumbent captains and first officers. ALPA is unable to cite any case in which a court held that an employer violated its duty to bargain by offering replacements salaries in excess of those proposed for persons to be hired in the future as opposed to incumbent employees. In such a case, we do not believe an employer violates its bargaining duty and, according-

ly, hold that United acted lawfully in hiring its replacement pilots at the guaranteed salaries.

Apart from violating United's duty to bargain in good faith, ALPA also contends that the hiring of replacement pilots at guaranteed salary levels unlawfully discriminated against the striking pilots. ALPA argues that the only lawful inducement that could be offered replacement pilots was an offer of permanent employment. Any other type of inducement, such as the guaranteed salaries offered here, would, according to ALPA, have destructive effects on the union membership once the strike ended. We disagree. Although we believe that United's policy of super-seniority (*i.e.*, the rebid) was unlawful, the guaranteed salaries involved here are of a different nature. ALPA attempts to sidestep this difference by arguing that the logic of the Supreme Court's decision in *Erie Resistor*, *supra*, regarding super-seniority applies equally as well to the guaranteed salaries. However, even the Supreme Court has noted the limited applicability of that case. *See Belknap*, 463 U.S. at 505 n.8 (noting that *Erie Resistor* "involved an offer of super-seniority to replacements" and that "[t]he opinion was careful to distinguish cases not involving that element").

Moreover, as the district court observed, the striking pilots will not suffer the discriminatory harm as a result of our upholding of the guaranteed salaries that they would be subjected to by implementation of the rebid. Under the new agreement, the striking pilots returned to the same positions at the same salaries they had prior to the strike. Our conclusion that the guaranteed salaries are lawful will have no effect on this situation. On the other hand, if the rebid program were implemented, each striking pilot would potentially be subject to losing his position to a less senior nonstriking pilot. In other words, the guaranteed salaries to replacement pilots do not discriminate against the striking pilots as would the rebid super-seniority procedure. Indeed, unlike the rebid, the guaranteed salaries will have the same effect on nonstriking United pilots as they do on striking pilots. Nonstrik-

ing pilots who crossed the picket line, as opposed to replacements hired during the strike, will neither gain nor lose as a result of the guaranteed salaries. ALPA's argument that the guaranteed salaries discriminate solely against striking pilots is, therefore, misplaced.

In addition, the district court found that the guaranteed salaries, as opposed to the rebid, were necessary to keep United running. If we were to hold that United was not able to take the necessary steps to keep its operations going through a strike, we would, in effect, eviscerate its lawful right to self-help. Under the RLA, an employer has the right to maintain its operation even if this means hiring replacements for striking workers. In this case United acted responsibly in hiring replacements at guaranteed salaries which the district court considered reasonable under the circumstances. In light of United's right to self-help, we will not disturb that action.

Finally, we also reject ALPA's argument that the guaranteed salaries were superseded by the new collective bargaining agreement between the union and United. Relying on *Brotherhood of Railway & Steamship Clerks v. Florida East Coast Railway, supra*, ALPA argues that the guaranteed salaries could only lawfully be in effect during the temporary duration of the strike. In that case, the Supreme Court ruled that an employer's power during a strike "to make new terms and conditions governing the new labor force is strictly confined." 384 U.S. at 247. As we noted before, however, the collective bargaining agreement in *Florida East Coast* remained in effect during the strike. ALPA's reliance on this decision in a case in which the collective bargaining agreement had already expired prior to the strike is therefore tenuous. More directly on point is the Supreme Court's decision in *Belknap, Inc. v. Hale, supra*. In *Belknap*, the Court held that permanent replacements are not preempted by federal law from suing their employer to enforce the employer's promise of employment. The Court noted that if an employer decides to exercise its right to hire permanent replacements, "it surely does not follow that the

employer's otherwise valid promises of permanent employment are nullified by federal law . . . ." 463 U.S. at 500. Similarly, in the present case we conclude that the district court did not err in ruling that the RLA was not a bar to United's fulfillment of its promise to the replacement pilots.

IV.

The final issue we reach regards the status of the Group of 500. The district court ruled that the Group of 500 became United employees on May 17, the day the strike began, and that thereafter United's treatment of these pilots violated section 2, Fourth of the RLA, 45 U.S.C. § 152, Fourth. Under section 2, Fourth, a carrier is prohibited from, among other things, denying or questioning "the right of its *employees* to join, organize, or assist in organizing the labor organization of their choice . . . or to influence or coerce *employees* in an effort to induce them to join or remain or not to join or remain members of any labor organization." (emphasis added). United appeals arguing, *inter alia*, that the Group of 500 were never employees and hence not afforded protection under section 2, Fourth.

In reviewing the district court's decision with respect to the Group of 500, ALPA contends that we must apply the "clearly erroneous" standard specified in Fed. R. Civ. P. 52 since the question of whether these pilots are employees is a factual one. To support its position, ALPA cites the recent Supreme Court decision in *Icicle Seafoods, Inc. v. Worthington*, 106 S. Ct. 1527 (1986). In *Icicle*, the Court considered the proper standard of review applicable in examining a district court's finding that the respondents were "seamen" for purposes of the Fair Labor Standards Act. On appeal from the lower court's ruling, the Ninth Circuit, applying a *de novo* standard of review, engaged in its own factfinding and concluded that the respondents were in fact not seamen. In reversing this decision, the Supreme Court noted:

> If the Court of Appeals believed that the District Court had failed to make findings of fact essential to a proper resolution of the legal question, it should have remanded to the District Court to make those findings. If it was of the view that the findings of the District Court were "clearly erroneous" within the meaning of Rule 52(a), it could have set them aside on that basis. If it believed that the District Court's factual findings were unassailable, but that the proper rule of law was misapplied to those findings, it could have reversed the District Court's judgment. But it should not simply have made factual findings on its own.

106 S. Ct. at 1530.

ALPA argues that similar to *Icicle* the district court's finding that the Group of 500 are United employees is a finding of fact and hence is reviewable only under the clearly erroneous standard. We find this contention without merit. There is no dispute regarding the factual findings made by the district court surrounding the Group of 500; rather, the issue is whether, given these facts, the court properly applied the RLA to conclude that the Group of 500 were United employees as of May 17. In other words, it is not simply a question of "applying a legal standard to a descriptive or historical narrative," *Mucha v. King*, 792 F.2d 602, 605 (7th Cir. 1986), but rather a question of whether the proper legal standard was applied. Accordingly, we review *de novo* the district court's conclusions with respect to the employee status of the Group of 500.

In concluding that the Group of 500 were employed by United, the district court did recognize that the RLA specifically defines the term "employee." Under the Act an employee "includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce

Commission . . . ." 45 U.S.C. § 151, Fifth. *See* 45 U.S.C. § 181 (providing that 45 U.S.C. § 151 extends to "every air pilot or other person *who performs any work as an employee* or subordinate official of such carrier or carriers, *subject to its or their continuing authority to supervise and direct the manner of rendition of his service*") (emphasis added). *See also* 45 U.S.C. § 182 (applying definition of 45 U.S.C. § 151, Fifth to the airline industry "as though such carriers and their employees were specifically included within the definition of 'carrier' and 'employee', respectively, in section 151 of this title"). Nonetheless, the court found that the Group of 500 became employees on May 17. To reach this result the trial judge, relying on *Pennsylvania Railroad v. Day*, 360 U.S. 548 (1959), and *Air Line Pilots Association v. Alaska Airlines, Inc.*, 735 F.2d 328 (9th Cir. 1984), stated that the definition of "employee" under the RLA is not to be interpreted narrowly.

Even construing the term "employee" broadly under the RLA, however, the district court refused to find that the Group of 500 were employees during their training period. ALPA does not contest this conclusion. The trial judge did nonetheless find that all members of the Group of 500 had accepted employment with United on May 17 and that as such they became employees on that date even though they refused to report to work. To support its position that "[p]hysically reporting to work to establish an employer-employee relationship is not a prerequisite to the right to strike on the first day of employment," 614 F. Supp. at 1042, the court relied on *NLRB v. New England Tank Industries, Inc.*, 302 F.2d 273 (1st Cir.), *cert. denied*, 371 U.S. 875 (1962). In that case, the First Circuit ruled that an employer's refusal to hire former employees of its predecessor because of the employees' union activities violated the NLRA. Additionally, the court found that three union members who were offered jobs but refused to report because of the employer's anti-union actions were unfair labor practice strikers who were entitled to employment at the conclusion of the strike. The

employer argued that these men, since they had never worked for it, were not employees and hence had no right to strike. The court disagreed noting that even though the men had "never actually reported to work" they would have "but for the company's illicit policies and acts . . . ." *New England Tank*, 302 F.2d at 277. In the instant case, the district court concluded, as had the court in *New England Tank*, *id.* at 278, that requiring persons who were offered jobs to report to work before they could be considered employees would be a meaningless exercise.

After reviewing the statutory definition of employee under the RLA, we are, however, forced to conclude that the district court erred in ruling that the members of the Group of 500 became United employees on May 17.[17] These pilots never performed any work for United nor did they ever submit to United's supervision of them in their work. By its own terms, the definition of employee under the RLA would exclude our giving the Group of 500 employee status. *See Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980) (noting that "[a]bsent a clearly expressed legislative intention to the contrary, [statutory] language must ordinarily be regarded as conclusive"); *Richards v. United States*, 369 U.S. 1, 9 (1962) (in general a statute's "legislative purpose is expressed by the ordinary meaning of the words used").

Furthermore, we disagree with the district court's conclusion that both *Day*, *supra*, and *Alaska Airlines*, *supra*, support a broad reading of the RLA's definition of employee. In *Day*, the Supreme Court held that jurisdiction of the National Railroad Adjustment Board under the RLA would extend to cover a pay dispute involving an employee who had subsequently retired. The Court ruled that the provisions of the RLA would still apply in a case

[17] Because we conclude that the Group of 500 were not "employees" entitled to protection under section 2, Fourth of the RLA, we have no need to reach United's argument that section 2, Fourth is limited solely to the regulation of union organization.

where "the employee has retired from service after initiating a claim for compensation for work performed while on active duty," 360 U.S. at 551, noting that "[t]here is nothing in the Act which requires that the employment relationship subsist throughout the entire process of administrative settlement." *Id.* at 551-52. Similarly, in *Alaska Airlines*, the Ninth Circuit held that a retired pilot was entitled to file a grievance under the RLA regarding calculation of his retirement benefits. The court held that the grievance, like the dispute in *Day*, arose within the employer-employee relationship and could therefore be adjudicated under the Act. 735 F.2d at 328-29.

The Supreme Court in *Day* and the Ninth Circuit in *Alaska Airlines* considered disputes which arose out of the employer-employee relationship. In both cases former employees raised claims regarding either incidents that occurred or benefits that accrued while they had been employed and subject to the protections of the RLA. It unduly stretches the logic of these decisions to apply them to the instant case. The members of the Group of 500 are not seeking to resolve issues which arose during their employment nor are they concerned about benefits which accrued during that period. Rather, they are simply trying to interpret the RLA broadly so that they will be deemed employees even though they never began working for their alleged employer. Neither *Day* nor *Alaska Airlines* support such a conclusion.

Indeed, in a similar case the National Mediation Board[18] ruled that persons in a position like the members of the

[18] The NMB is the administrative body that determines which persons are eligible to participate in representation elections under the RLA. 45 U.S.C. § 152, Ninth. It is well-established that the NMB's interpretation of those provisions of the RLA over which it has responsibility is entitled to deference. *See Switchmen's Union v. National Mediation Board*, 320 U.S. 297, 299-31, 303-04 (1943); *Chicago Truck Drivers Union, Helpers & Warehouse Workers v. National Mediation Board*, 670 F.2d 665, 670 (7th Cir. 1981).

Group of 500 would not be considered employees for purposes of the RLA. In *In re Union of Flight Attendants (Air Micronesia)*, 10 N.M.B. 11 (1982), the NMB ruled that a group of trainees were not employees under the RLA and were therefore ineligible to vote in representation elections. In rejecting the argument that these people should be considered employees since they had completed their training and had expectations of employment, the NMB noted:

> [T]he three subject individuals have never been on the carrier's payroll as working employees. At best, they have the mere hope of an offer if an opening arises at some time in the future. . . .
>
> Clearly, a person who has been trained in the hope of a future job offer, but who is free in the interim to seek any other employment, and whose present availability is unknown, is not a person subject to the carrier's "authority to supervise and direct the manner of rendition" of service.

Id. at 14 (quoting 45 U.S.C. § 181). *Cf. Walling v. Portland Terminal Co.*, 330 U.S. 148 (1947) (ruling that trainees are not employees under the Fair Labor Standards Act's definition which provides, pursuant to 29 U.S.C. § 203(e)(1) (Supp. III 1985), that an employee is "any individual employed by an employer"); *Donovan v. American Airlines, Inc.*, 686 F.2d 267, 272 (5th Cir. 1982) (trainees for certain positions were not employees under FLSA where they were never on the payroll, and never displaced, substituted for, or supplemented regular airline employees during their training).

A similar conclusion was reached by the court in *Nelson v. Piedmont Aviation, Inc.*, 750 F.2d 1234 (4th Cir. 1984), *cert. denied*, 105 S. Ct. 2358 (1985). In that case, the court ruled that an applicant for a job is not an employee under the RLA and that therefore the plaintiff applicant had no cause of action under the Act. Relying on the specific language of the RLA defining the term employee, the court stated:

> Here the statutory language does not admit of doubt. At the time of his application to Piedmont, [the applicant] was not "in the service of a carrier" and did not "perform any work" for an airline as specified by 45 U.S.C. § 151 Fifth. Therefore, [the applicant] was plainly not subject to the protections of 45 U.S.C. § 152 Fourth, prohibiting an employer from interfering with an employee's free choice of whether or not to join a labor organization.

Id. at 1236. *See International Longshoremen's Association, AFL-CIO v. North Carolina State Ports Authority*, 370 F. Supp. 33, 40 (E.D.N.C. 1974) (noting that "the employees must be in the service of a carrier and the work performed by the employees must bear a direct relationship to the transportation activities of the . . . carrier"), *aff'd*, 511 F.2d 1007 (4th Cir. 1975) (per curiam). We agree with the NMB and the Fourth Circuit that trainees and applicants simply do not fall within the RLA's definition of employee. Accordingly, we hold that the district court erred, as a matter of law, in concluding that the Group of 500 were United employees as of May 17.

We recognize that although *New England Tank, supra*, may at first glance seem to support the district court's conclusion, in the end we believe that the court's reliance on that case is misplaced. We do not believe that the holding under the NLRA in *New England Tank* which provided that a person may become an employee without reporting to work because of a strike is applicable to the RLA. It would be in direct contravention of the RLA's definition of employee to conclude that a person may become an employee even though he never performed any work for the employer and was never under that employer's direct supervision. We must begin with the plain and ordinary meaning of the words in construing a statute and regard that language as conclusive absent a clearly expressed legislative intent to the contrary. *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982). ALPA has provided no convincing evidence that Congress did

not intend that the RLA's definition of employee meant what it said. We therefore conclude that unless a person has performed services for the employer under that employer's supervision he is not an employee for purposes of the RLA.[19]

Even conceding that the members of the Group of 500 were not employees under the RLA, ALPA argues that we should uphold the district court's alternative ruling that United violated section 2, Fifth of the Act, 45 U.S.C. § 152, Fifth. Section 2, Fifth provides in pertinent part that

---

[19] ALPA argues that because the Group of 500 accepted offers of employment from United that, under common law, they were not required to report to work to be considered employees for purposes of the RLA. We disagree. The definition of employee under the Act makes it clear that a person must perform work for his employer under that employer's supervision to be deemed an employee. Members of the Group of 500 failed to perform any services for United and were hence never employees of the airline. *See Walling v. Portland Terminal Co.*, 330 U.S. 148, 150 (noting that "in determining who are 'employees' under [the FLSA], common law employee categories or employer-employee classifications under other statutes are not of controlling significance").

ALPA's reliance on *Nashville, C. & St. L. Ry. v. Railway Employees' Dep't of Am. Fed'n of Labor*, 93 F.2d 340 (6th Cir. 1937), *cert. denied*, 303 U.S. 649 (1938), is inapposite. The issue in *Nashville* was whether a person who had performed services for his employer in the past but was now on temporary furlough should be considered an employee under the RLA. The court held that furloughed employees who retained their seniority rights entitling them to preference in reinstatement were employees under the Act. Indeed, the court noted that the furloughed employees were all back at work by the time the case was tried below. *Id.* at 343. The difference between the situation in *Nashville* and the present case is evident. Whereas the workers in *Nashville* had performed services for their employer and were only on temporary furlough, the members of the Group of 500 had never worked for United. Our holding that the Group of 500 are not employees is, therefore, consistent with the Sixth Circuit's ruling in *Nashville*.

> [n]o carrier, its officers, or agents shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization . . . .

The district court held that

> [b]y making employment contingent on crossing the picket line, United has violated Section 2, Fifth by requiring "persons" not to join the union or its activities. United was clearly aware that requiring the student pilots to cross a lawful picket line would disqualify them from future union membership.

614 F. Supp. at 1043-44. In so ruling, the court relied on cases interpreting section 8(a)(3) of the NLRA which makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." 29 U.S.C. § 158(a)(3).

We agree with the district court that section 2, Fifth of the RLA is applicable to members of the Group of 500. As opposed to other provisions of the Act which extend solely to "employees," section 2, Fifth applies to "persons." Accordingly, drawing on the ordinary meaning of the statute, we can conclude that the term persons encompasses more than the term employees so that applicants for employment and the like are afforded protection against employer coercion regarding the signing of agreements to join or not join a labor organization. We also recognize that, as the district court asserted, section 8(a)(3) of the NLRB provides protection to employees or prospective employees from a broad range of anti-union discrimination. In *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941), for example, the Supreme Court rejected the proposition distinguishing between discrimination in hiring and terminating employment under the NLRA. In so doing the Court noted:

> Discrimination against union labor in the hiring of men is a dam to self-organization at the source of supply. The effect of such discrimination is not confined to the actual denial of employment; it inevitably operates against the whole idea of the legitimacy of organization.

Id. at 185.

We must part company with the district court, however, regarding its conclusion that the RLA embodies the same policies as does the NLRA with respect to employer coercion and that therefore section 2, Fifth must be read broadly to bar an employer from conditioning employment on a person's reporting to the first day of work during a union strike. We recognize that a court has a certain degree of latitude in interpreting statutes to ensure that the congressional purpose is effected. This latitude does not, however, empower a court to override the plain meaning of a statutory provision in order to effect, by judicial fiat, the purpose it chooses to give the legislation. In the present case, section 2, Fifth provides only that an employer not require a person to sign a contract or agreement either promising to or not to join a union. This statutory language is a far cry from section 8(a)(3) of the NLRA which prohibits, among other things, anti-union discrimination with respect to hiring decisions or conditions of employment. Whereas section 8(a)(3) provides a union protection from a broad range of discriminatory attacks, section 2, Fifth specifically defines those acts which are unlawful.

ALPA fails to cite any case or legislative history which would support giving section 2, Fifth the broad reading it advocates. ALPA does rely on section 2, Fourth of the RLA to argue that Congress intended to give broad protections from employer coercion. What ALPA conveniently ignores, however, is the fact that section 2, Fourth is applicable solely to "employees" and not merely to any "person" as is section 2, Fifth. The language of section 2, Fifth is clear and we refuse to give it a gloss, in the

absence of a clearly expressed intent of Congress, that the language cannot reasonably support. If Congress had wanted section 2, Fifth to apply as broadly as section 8(a)(3) it would never have drafted the statutory language of the former provision so narrowly. There is no evidence in the instant case showing that United required members of the Group of 500 to sign agreements not to join ALPA as a condition of their employment. Accordingly, we hold that the district court erred in ruling that United violated section 2, Fifth. *See Nelson v. Piedmont Aviation, Inc.*, 750 F.2d at 1236 (ruling that section 2, Fifth was inapplicable since the "appellant [made] no claim that [the employer] attempted to extract any promises from him in violation of this provision").

ALPA contends that this view of section 2, Fifth undercuts Congress's purpose in enacting the provision. We agree with the union that section 2, Fifth, along with section 2, Third and Fourth, serve to advance the maintenance of effective labor organizations. *See International Association of Machinists v. Street*, 367 U.S. 740, 759 (1961). However, we cannot accept ALPA's argument that, in essence, section 2, Fifth incorporates the protections afforded by section 2, Third and Fourth. We do not believe that limiting section 2, Fifth to its express language undercuts the congressional intent of providing protection to persons from employer coercion. By its own terms, section 2, Fifth shields persons from being coerced into joining or not joining a union prior to employment. Once these persons become employees they will receive all of the protections necessary to ensure that their union will remain a viable representative of their interests. Under these circumstances, we see no need to expand section 2, Fifth to the dimensions ALPA advocates.[20]

---

[20] We also reject ALPA's argument that United's requirement that the Group of 500 cross the picket line to become employees was in essence an agreement not to join a union. We recognize that under ALPA's constitution it is unlikely that the pilots who

(Footnote continued on following page)

Finally, in the alternative, the district court held that United violated section 2, Seventh of the RLA by unilaterally altering the status quo in its institution of the " 'nonemployee' training program for the Group of 500." 614 F. Supp. at 1043. The court, relying on *Detroit & Toledo Shore Line Railroad, supra*, ruled that although there was nothing in the collective bargaining agreement between United and ALPA governing training of future pilots, such issues are nonetheless assumed to be part of the agreement and subject to the status quo provisions of the RLA.

Section 2, Seventh provides that

> [n]o carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, *as embodied in agreements* except in the manner prescribed in such agreements or in section 156 of this title.

45 U.S.C. § 152, Seventh (emphasis added). This provision is not the only section of the RLA which requires that the status quo be maintained, however. In *Detroit & Toledo Shore Line Railroad*, the Supreme Court reviewed the status quo that is mandated by sections 5, 6, and 10 of the RLA, 45 U.S.C. §§ 155, 156, 160. These sections, among other things, outline the procedures that must be followed when either party to an agreement seeks a contract modification. In *Detroit & Toledo Shore Line Railroad*, the Court rejected an argument by the employer that the status quo provisions of sections 5, 6, and 10 of the RLA apply solely to terms that are specif-

---

[20] *continued*
crossed the picket line will ever become union members. Nonetheless, United should not be held responsible for violating the RLA simply because ALPA seeks to discipline its members. Indeed, were United found to have violated section 2, Fifth each time it induced someone to cross the picket line, it would have been unable to exercise its right to replace striking employees. Since the right to hire permanent replacements is a recognized self-help measure, ALPA's argument undercutting that right must be rejected.

ically enumerated in the collective bargaining agreement. In so doing, the Court noted:

> We have stressed that the status quo extends to those actual, objective working conditions out of which the dispute arose, and clearly these conditions need not be covered in an existing agreement.

396 U.S. at 153.

In the instant case it is unchallenged that the relevant collective bargaining agreement made no mention of United's pilot training practices and procedures. ALPA argues that *Detroit & Toledo* requires that established procedures be deemed to be part of the collective bargaining agreement. For its part, United contends that ALPA's reliance on *Detroit & Toledo* is simply irrelevant in interpreting section 2, Seventh. United notes that the Court in *Detroit & Toledo* relied on sections 5, 6, and 10 of the RLA and specifically stated that section 2, Seventh was not part of its analysis. *See* 396 U.S. at 155-56.

At first glance, United's argument appears to have some merit. Section 2, Seventh requires that the status quo be maintained only with respect to those terms "embodied" in the agreement whereas the status quo provisions of sections 5, 6, and 10 are not specifically limited to the express terms of the agreement. *See* 45 U.S.C. § 155, First (b) (requiring that for thirty days after one party refuses arbitration, unless arbitration is subsequently agreed to or an emergency board is created, "no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose"); 45 U.S.C. § 156 (requiring that parties give notice of desired change in agreement and "[i]n every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this

title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board"); 45 U.S.C. § 160 (providing that after the creation of an emergency board "and for thirty days after such board has made its report to the President, no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose").

Although United's argument that section 2, Seventh deals solely with terms and conditions expressly stated in the agreement is plausible, we need not reach that issue. By its own terms, section 2, Seventh serves to protect the status quo of "rates of pay, rules, or working conditions of . . . *employees* . . . ." 45 U.S.C. § 152, Seventh (emphasis added). As we noted above, however, the members of the Group of 500 were never employees. Moreover, the change in training practices did not impact upon then current United employees. In short, the district court's reliance on section 2, Seventh is inapposite.

ALPA apparently concedes the inapplicability of section 2, Seventh since in its brief it relies solely on the status quo provisions of section 6. United's argument that we are limited to protecting the status quo with respect to express contractual terms then becomes irrelevant because under section 6 United's established training practices are arguably part and parcel of the collective bargaining agreement pursuant to *Detroit & Toledo Shore Line Railroad, supra*. Section 6 requires maintenance of the status quo with respect to rates of pay, rules, and working conditions. As the Court in *Detroit & Toledo* noted, section 6 extends only to "those actual, objective working conditions and practices, broadly conceived, which were in effect prior to the time the pending dispute arose and which are involved in and related to that dispute." 396 U.S. at 153 (footnote omitted). It goes without saying that "working conditions" serve to affect only employees included within the bargaining unit. United argues, therefore, that in the present case section 6 extends solely to its statu-

tory employees and not to the Group of 500. *Compare* 45 U.S.C. § 152, First (placing duty to reach and maintain agreements on employer and employee only) *with Detroit & Toledo*, 396 U.S. at 151-52 (acknowledging that the status quo provisions of the RLA must be read in conjunction with the implicit status quo requirement under section 2, First). We agree. The members of the Group of 500 are, accordingly, ineligible for relief under this provision.

Our analysis cannot end here, however, because United's treatment of the Group of 500, if it affected the pay rates, rules, or working conditions of pilots already in United's employ, could nonetheless be potentially violative of section 6. In *International Brotherhood of Teamsters v. World Airways, Inc.*, 111 L.R.R.M. (BNA) 2170 (N.D. Cal. Aug. 20, 1982), for example, the court refused to grant injunctive relief on grounds that section 6 was not violated by the airline's institution of a training program to prepare additional crews for use in a potential work stoppage. The court rejected the union's section 6 argument stating that such a "program is not a status quo violation so long as it is separated from the continuing operations of the Company." *Id.* at 2172. The union's request for injunctive relief was denied since it "failed to sustain its burden of showing any substantial current effect on operations." *Id. See Illinois Central Railroad v. Brotherhood of Locomotive Engineers*, 422 F.2d 593, 595-96 (7th Cir. 1970) (training program was violation of status quo where it interfered with current operations). We agree with the district court in *World Airways* that unless some effect of a change is shown on the rate of pay, rules, or working conditions involving employees no section 6 violation has occurred. In the instant case, ALPA has failed to make such a showing and, accordingly, we hold that the district court erred in ruling that United had violated the status quo mandated by section 6.

Our conclusion is not undermined by ALPA's argument that if United was not required to bargain regarding the Group of 500, the union should not have been required

to bargain regarding the new-hire pay scales which would only affect future employees. A union is required to bargain over the terms and conditions of employment that will be in place when future employees take their positions. This is not at all analogous to a duty to bargain with respect to terms and conditions imposed upon trainees who are not employees and who may never become employees.[21] ALPA's argument to the contrary is simply misplaced.

V.

For the reasons stated above, we affirm the decision of the district court with respect to the rebid procedure and the hiring of replacement pilots at guaranteed salary levels. We reverse the district court's holding with respect to the Group of 500.

AFFIRMED IN PART AND
REVERSED IN PART.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

[21] Contrary to ALPA's contention, our holding does not limit the union's ability to bargain with respect to the wages and conditions of employment that future employees will face. We only hold that United did not violate section 6 when it made changes in the terms and conditions of training as they apply to non-employees.

APPENDIX B

UNITED STATES DISTRICT COURT

N.D. ILLINOIS, E.D.

No. 85 C 4765

Aug. 1, 1985.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Plaintiff,

v.

UNITED AIR LINES, INC.,

Defendant.

MEMORANDUM ORDER

BUA, District Judge.

The above-captioned matter came before the Court for trial on the merits of plaintiff's complaint. The Court, having heard testimony June 17 through June 28, 1985, and having reviewed deposition designations, exhibits and memoranda submitted by the parties, does hereby enter the following findings of fact and conclusions of law pursuant to Rule 52(a) of the Federal Rules of Civil Procedure.

I. FINDINGS OF FACT

1. This action was filed on May 16, 1985 by plaintiff Air Line Pilots Association, International ("ALPA") against defendant United Air Lines, Inc. ("United"). The complaint alleged that United had violated or was about

to violate several provisions of the Railway Labor Act, 45 U.S.C. §§ 151, *et seq.* ("the RLA"). These allegations related to alleged acts of United during the time that ALPA and United were in the process of collective bargaining negotiations for a new agreement to replace the parties' agreement negotiated in 1981 ("the 1981 Agreement"). The allegations also related to plans which United had announced it intended to carry out if there were a strike by the pilots. On May 17, 1985, at 12:01 a.m. (E.D.T.), United's pilots commenced a strike against United.

2. On May 17, ALPA filed motions for preliminary injunction and for expedited discovery. The Court granted ALPA's discovery motion, also requiring that ALPA submit to expedited discovery by United. The Court scheduled a hearing on ALPA's motion for preliminary injunction for June 10, 1985. Subsequently, the hearing was rescheduled to June 17, 1985.

3. On May 28, 1985, United filed a motion to strike ALPA's claim for injunctive relief. United asserted that ALPA was not entitled to injunctive relief under section 8 of the Norris-LaGuardia Act, 29 U.S.C. § 108, because ALPA had failed to accept the proffer of arbitration by the National Mediation Board ("NMB") on April 16, 1985, after United had rejected the proffer. On June 7, 1985, the Court denied United's motion. *See* Memorandum Order, June 7, 1985, 610 F.Supp. 243.

4. On June 14, 1985, the United Air Lines Master Executive Council ("UAL-MEC") for the United pilots ratified a tentative agreement that had been reached between the negotiating committees for United and ALPA, thus ending the strike. The back-to-work agreement, which was ratified together with the basic economic agreement, provided in part:

> The Association and the Company agree that neither will engage in or condone any activities which might constitute reprisals or recriminations as a result of the ALPA strike. The Company will withdraw all Letters of Charge and all disciplinary actions taken against pilots for strike-related activities and will not take any further action against ALPA or pilots for strike-related activities. ALPA agrees not to level fines or take other disciplinary action against nonstriking pilots. *ALPA's claims regarding the "500" pilots, system rebid and salaries for pilots hired as "fleet qualified" will continue to be pursued by ALPA in Federal Court.* The parties agree to a plenary trial commencing June 13, 1985. Should there be any appeals both parties will agree to an expedited appeal. The parties will drop all other strike related litigation or arbitration.

Pl.Ex. 43 at ¶ 14 (emphasis added).

A. *The Parties*

5. ALPA is an unincorporated labor organization and is the duly certified exclusive collective bargaining representative under the RLA, for the air line pilots employed by United. Stipulation of Uncontested Facts ("Stipulation") at ¶ 1. Henry A. Duffy is the President of ALPA.

6. Representation of United pilots is controlled by the UAL-MEC which consists of three elected members from each of the nine pilot domiciles. Tr. 1253. Roger Hall is the Chief Executive Officer of UAL-MEC. UAL-MEC's chief negotiator is William C. Brashear, and the Chairman of ALPA's United Pilots Strike Committee is Frederick C. Dubinsky.

7. United is a corporation duly organized and existing under the laws of the State of Delaware, having an office and place of business in the Township of Elk Grove, Cook County, Illinois. United is an air carrier as defined in the Federal Aviation Act of 1958, as amended (49 U.S.C. §§ 1301-1542), holding certificates of public convenience and necessity issued pursuant to that Act, under which certificates it operates an airline system for the carriage by air of passengers, property and mail in domestic, overseas and foreign commerce. As such, United is a "carrier" as defined by 45 U.S.C. § 181, and is subject to the provisions thereof. Stipulation at ¶ 2.

8. United's Chairman and Chief Executive Officer is Richard J. Ferris and its President is James J. Hartigan. United's chief negotiator is David Pringle, and James Guyette is Chairman of United's Operations Adjustment Task Force. Lloyd W. Barry is Senior Vice President of Flight Operations.

9. United's airline system is the largest domestic carrier in the United States. United serves more than 150 cities in the United States, including Chicago, and approximately 10 cities in 5 foreign countries and territories, and has operating routes extending over approximately 500,000 route miles. United has a fleet of over 300 aircraft owned and leased. Stipulation at ¶s 3-4.

10. In its air transport operation, United employs over 48,000 persons. Among these are some 9,000 persons employed in the craft or class of flight attendants represented for the purpose of collective bargaining under the RLA by the Association of Flight Attendants ("AFA") and approximately 15,000 persons employed in various crafts and classes represented by District 141, International Association of Machinists and Aerospace Workers ("IAM").

United, AFA and IAM are currently parties to existing collective bargaining agreements. Stipulation at ¶ 4.

B. *Events Preceding the Strike*

11. For many years ALPA and United have been parties to successive collective bargaining agreements. The agreement in effect prior to the strike had been in effect since October 1981 and contained the following duration clause:

> This Agreement shall continue in full force and effect until October 1, 1983 and shall renew itself without change each succeeding October 1 thereafter, unless written notice of intended change is served in accordance with Section 6, Title I, of the Railway Labor Act, as amended, by either party at least sixty (60) days prior to October 1, 1983 or any year thereafter upon written notice of either party thereto.

Pl.Ex. 1, Section 22 at ¶ C. The parties later extended the October 1, 1983 date to April 1, 1984 by agreement.

12. On January 30, 1984, United served an opening letter under Section 6 of the RLA upon ALPA. Tr. 948; Def.Ex. 146. In turn, ALPA served its own Section 6 Notice upon United stating its various proposals for modifications to the 1981 Agreement. Tr. 955; Def.Ex. 145. Issues signaled for negotiation included, *inter alia,* compensation for incumbents, new-hire rates and the method for assigning cockpit seats to pilots. Def.Exs. 145 and 146. These proposals are known as "Section 6 Openers" in that they commenced the process for amendment of the 1981 Agreement provided in Section 6 of the RLA, 45 U.S.C. § 156.

13. Prior to the Airline Deregulation Act, P.L. 95-504, 92 Stat. 1705, the commercial airline industry was regulated as to its route structure, rates it could charge passengers,

and the like. During the regulated era, United (and other trunk carriers) had little economic incentive to seek to contain pilot labor costs.

14. As negotiations progressed during 1984, it became clear to the parties that the most difficult issue before them was United's request that ALPA agree to a new, reduced pay scale to apply to pilots hired during the term of the potential new agreement. This pay scale issue has been referred to as the "new-hire pay scale." United's objective in its negotiations with ALPA was to secure what was, in United's judgment, a "cost competitive" agreement with ALPA. Tr. 442-43. United was concerned that its competitors, especially American Air Lines, benefitted [sic] from lower pilot costs. Tr. 946; 1012. Although United made an operating profit of more than $500 million in 1984 (Tr. 508), it had incurred operating losses for the previous five years. Tr. 1015; Def. Ex. 146.

15. In August 1984, mediators from the NMB entered the collective bargaining negotiations. Tr. 962.

1. *Task Force Created*

16. In the fall of 1984, United began to plan for the possibility of a strike by the pilots. United created a task force to develop a plan to operate in the event of a pilots' strike. The flight operations aspect of the planning was committed to the direction of Captain Lloyd Barry, who had become Senior Vice President of Flight Operations in March 1984. Tr. 234, 299, 380. Barry was assisted by Rakesh Gangwald, a systems analyst who was brought in to aid Barry in developing administrative business processes for flight operations. Tr. 376.

17. United's flight operations strike plan was called the "operations adjustment plan." Pl. Ex. 22; Tr. 301. United was aware that its operations adjustment plan might not

create enough pressure to force ALPA to settle on United's terms prior to May 17. United believed that, if a strike took place, the plan would break the strike, and thereby force ALPA to settle on terms preferred by United. Tr. 302-4. The breaking of the strike and forcing of a settlement was the objective of United's flight operations adjustment plan. *Id.;* Tr. 343. The elements of this plan were regarded by United as so "stern or unusual" (Tr. 534) that, if a strike occurred, there would be a "stampede" of pilots to the United side. Tr. 464. United believed that it could break the strike in two to four days. Tr. 302-3; Pl. Ex. 22. Ferris believed that United would secure its objective:

> You know what's going to happen, if we have this withdrawal of service, what's going to happen is eventually the membership is going to be fed up enough—it's the old story, throw the rascals out, put a new one in; we negotiate to come back on the property.

Tr. 470, Videotape of O'Hare Domicile Meeting, May 2, 1985.

2. *The "Group of 500"*

18. Also in the fall of 1984, United began to experience a shortage of pilots for its desired flight schedule. Tr. 41, 1011.

19. Prior to the fall of 1984, United last hired new pilots during the period between 1977-79. Stipulation at ¶ 33; Tr. 102. Approximately 800 pilots were hired in that time. Tr. 34. Those individuals were brought into United in order to serve in the entry-level position of second officers. Stipulation at ¶ 33; Tr. 34, 38, 41.

20. Prior to the fall of 1984, United's practice was to employ student pilots from the first day of training.

Stipulation at ¶ 33; Tr. 40, 337-38. Training of student pilots was conducted in accordance with rules in the 1981 Agreement, whether or not the student pilots were being trained with incumbent pilots. Tr. 104, 143. Student pilots were paid at rates established in the 1981 Agreement. Tr. 339. Pursuant to the 1981 Agreement, the student pilots accrued pilot seniority from their first date of hire as student pilots. Pl.Ex. 1, Sec. 6(A)(1), p. 35.

21. During United's hiring of student pilots in the period 1977 to 1979, when Initial Operating Experience ("IOE") was a domicile activity, student flight officers were: (1) provided tentative pilot seniority numbers on their first or second day of training at Denver, conditioned upon the successful completion of training and receipt of an assignment to the line for second officer duty; (2) assigned to the line for second officer duty upon completion of the Denver training program; (3) provided final seniority numbers at the time of their completion of training and assignment to the line for second officer duty; and (4) had their IOE at their assigned domicile subsequent to the above stated events. Tr. 731. In 1978-79, individuals hired for student pilot positions became line pilots with final seniority numbers on the United pilot system seniority list upon the completion of training and prior to beginning IOE. Tr. 630-631, 646, 731; Pl.Ex. 47. Less than 1% of pilots who completed their training in 1977-79 failed to complete their IOE. Court Ex. 1 at ¶ 45.

22. During the fall of 1984, while United was negotiating with ALPA as to the new-hire pay scale, United did not want the new hires "on the property" while the negotiations were in progress because, in its view that would make it more difficult for ALPA to agree to a reduced new-hire scale. Tr. 340-41. In addition, United did not wish to pay new hires at the incumbent rates provided in the 1981

Agreement. Tr. 42, 339. Accordingly, United decided that it would "pretrain" several hundred "applicants," who would be offered "formal employment" once United had secured a cost competitive agreement with ALPA. Tr. 45, 112, 231, 340, 484, 1122-23. During this time, United was unable to expand and lost market share. Tr. 484-85.

23. Beginning in November of 1984, United interviewed and selected approximately 600 candidates for its training program. Tr. 45 ("the Group of 500" or "student pilots"). Approximately 8 applicants were screened for each of the student pilots selected. Tr. 113. A "considerable amount of money" was spent to conduct the selection, which included interviews, psychological testing, and evaluation at the controls of United's aircraft cockpit simulators in Denver. Tr. 43-44.

24. As the student pilots were selected for United training, they were required to execute a form described as a "Flight Officer Training Agreement." *E.g.* Def.Ex. 140. In the forms, the student pilot agreed that he or she would receive United flight officer training "without charge for tuition" and would receive "$30 per day for expenses for the duration of my training period." The student pilot further was required to agree that "[d]uring this training, I understand that I will not be an employee of United Airlines and will receive no compensation from United other than expense money." The agreement further provided:

> I undestand that graduates of Flight Officer Training will constitute a pool of trained candidates for Flight Officer employment, which United Airlines may employ, if needed, within twelve months of graduation. I understand that in order to be offered such employment, that I must continue to meet the requirements and qualifications for the flight officer position.

It was also agreed that United could terminate the training or employment without notice or liability. Def.Ex. 140. The student pilots were expected to provide their own lodging and meals out of their expense money. Pl. Ex. 5 at p. 4. United informed the Group of 500 that they would be offered employment by class date (the date their initial training commenced). Tr. 155, 199.

25. The training consisted of initial training and four to five days of refresher training. Court Ex. 1 at ¶ 44. As they were selected, the student pilots entered a three-week second officer training program at United's Denver Training Center. They were trained on a scheduled determined by United which resulted in a more condensed training period than was customary at United in the past. Tr. 136. During their initial training, the student pilots were measured for their uniforms, which were later ordered for them approximately a month before May 17, 1985. Tr. 109. United generated a list of tentative seniority numbers for the student pilots, ranked in order of their class dates, and, within the classes, their Social Security numbers. Court Ex. 1 at ¶ 43.2; Pl.Ex. 90. It was United's intent that the student pilots "accepting employment when offered will receive a short refresher course and IOE [initial operating experience]." Pl.Ex. 5 at p. 3. Training, however, would be complete upon conclusion of the refresher course, prior to IOE. Court Ex. 1 at ¶ 44. This break in training, resulting in use of a short refresher course, and the fact that the training course took less time than in the past, were additional differences from United's previous training program for new hires. Tr. 135, 137.

26. Only 2% of the total numbers of student pilots failed to complete initial training. Tr. 120. Upon completion of their initial training, the Group of 500 was provi-

sionally qualified to serve as United second officers, lacking only their IOE to become fully qualified to engage in line flying. Pl.Ex. 42; Tr. 159.

27. On about April 20, 1985, United offered second officer employment to approximately 375 members of the Group of 500 who had successfully completed initial training. Tr. 48, 49; Pl.Ex. 8. The offers were effective May 17, 1985, whether or not there was a strike, at $1,800 per month for 81 hours, and stated that the four-day refresher course would start as early as May 3, 1985. Stipulation at ¶ 38; Tr. 48, 49; Pl.Ex. 8. In order to accept United's offer, the recipient was required to respond by telephone no later than April 24, 1985. Pl.Ex. 8. Approximately 325 of the recipients accepted and were scheduled for their refresher courses to commence at various dates commencing May 3, 1985. Tr. 50, 149; Pl.Ex. 9 (as modified by Def.Ex. 79A). The student pilots then received a mailing from United's Director of Flight Standards and Training, William Traub, stating that "I am sure you are looking forward to beginning your career as a United Airlines Second Officer as much as we are." Pl.Ex. 6. Traub enclosed with the letter a package of home study material to be completed prior to refresher training and several written tests. The letter advised the recipient that his change to "permanent status will occur on May 17, 1985 or on the day you enter training whichever is later." *Id.* at p. 2.

28. In addition to the Traub letter, the student pilots who accepted United's April 20 offer were sent a further confirming letter by the Manager of Flight Employment, Raymond Boyle, *E.g.*, Pl.Ex. 12; Tr. 51-52. The letter confirmed that employment would be effective May 17, 1985, specified a date for resumption of training prior to May 17, and requested that the recipient report on the date training would resume. Pl.Ex. 12; Tr. 50-52. The recipient

was also requested to complete a package of employment forms which were enclosed with the letter. Pl.Ex. 12; Tr. 52.

29. Most of the Group of 500 were given employment dates of May 17, 1985. Tr. 47. Some of the Group of 500 who were offered jobs in United's mailgrams (Pl.Ex. 8) were initially scheduled for refresher training to begin after May 17, 1985. Believing that the later starting dates might create seniority conflicts, United sent another mailgram on May 4 to the small group of student pilots whose refresher and training had been scheduled after May 17. Def.Ex. 76. This mailgram, unlike Pl.Ex. 8, specifically required that "[t]o accept our offer, you must be able to report to work in Denver on May 17." Def.Ex. 76.

30. As the strike deadline of May 17 approached, United addressed a letter to the Group of 500 specifically requesting that they report "at 0800 hours" to the Denver Flight Training Center on May 17. Def.Ex. 77. The letter, however, was mailed after prior offers had been accepted. Pl.Ex. 6, 12, 9. The letter was to "make it absolutely clear everybody got the same message and would be reporting at the same place." Tr. 92.

31. When United first offered employment to the Group of 500, it did not hire them to serve as "crossovers" in a pilot strike. Tr. 50. For example, Brent Barrett, one of the Group of 500, was told by United, when offered employment on April 20, that "it is up to you" whether he honored a picket line in the event of a strike. Tr. 204. Barrett was previously told that United did not want to put the new-hire pool on the line until it "had a contract" with ALPA. Tr. 231. Daniel Petrovich, another member of the Group, had been told by United that he would not be asked to "cross the picket line." Tr. 158.

32. As the May 17 strike deadline approached, however, United began to view the Group of 500 as a pool of trained replacements for striking pilots. Thus, United told the Group that if they did not work on May 17, they would not work for United in the future. Tr. 342, 170. United officials also told members of the Group that Ferris had already decided that they would "never work for United Air Lines if we didn't show up on the 17th" of May. Tr. 210. They were told that "if they don't cross the picket line and go to work on the 17th, you will never work for United Air Lines." Tr. 171. Some of the Group of 500 were told that if they did "take the job," complete their training and then join the strike, they "would not make it through their probation year" as pilots. Tr. 168-69. Prior to the strike, Ferris personally told United's TCAs in Denver,

> We have got 500 pre-hires, right? Those pre-hires are all going, they've been given notice, and come 0001 May 17, they're employed, boom. If they don't show up to work, they will never, ever, work for this air line, ever, because they're not on the property, they won't have a number, they don't have anything.

Tr. 728.

33. As of May 17, 1985, under this training program, approximately 600 individuals were selected for training by United. Tr. 35, 135-36, 365. United issued seniority numbers, however, only to those of the Group of 500 who reported to work on May 17, 1985 and who were put on the company payroll at that time. Such seniority numbers did not become final until the student pilot received an assignment to a line position. Court Ex. 1, at ¶ 43(2).

34. Also as of May 17, 1985, approximately 150 of the Group of 500 had completed their refresher training and

10 to 12 had completed their IOE. *Id.* at ¶ 44. United did not assign any member of the Group of 500 to the line, or provide them with final seniority numbers prior to May 17, 1985, whether or not they completed their initial training, whether or not they completed their refresher training, or whether or not they completed their IOE. *Id.* at ¶ 43(3).

35. On May 17, with the strike in progress, few of the Group of 500 crossed the ALPA picket lines. The striking Group members testified that they physically approached the training facility on the morning of May 17, encountered the ALPA picket line, declined to cross, and signed a report form provided by ALPA which was subsequently supplied to United. Pl.Ex. 38; Tr. 175-76, 214, 1473.

36. At 0001 EDT May 17, 1985, some of the Group of 500 were undergoing United training in the Avia training facility in Long Beach, California. When these pilots learned from management that the strike had occurred and a picket line had been established, they departed the training facility. Tr. 174. Daniel Petrovich was told at that time by his Training Check Airman, John Jacobs, that United President James Hartigan had just told him that the strike was in progress and that if the trainees left the Avia facility "they would all be terminated." Tr. 173.

37. Paula Wenz, another member of the Group of 500 who refused to cross the picket line, testified that TCA Brown told her and others on May 6 that

> if on May 17th we didn't cross the picket line, that we would never work for United Air Lines again, and he said if by some reason we were included into a back-to-work agreement or whatever, he would personally see to it that we would never make it through our probationary year.

Tr. 1472. Wenz had never previously been told that she would have to cross a picket line in order to become a United pilot. *Id.*

38. Under the ALPA Constitution and By-Laws, a member may be expelled for "[p]erforming work for or assisting an airline during a period when the members of this Association are on strike against such airline." Def.Ex. 170, Art. VIII, Sec. 1(A)(5). Applicants who have been "involved in alleged strikebreaking shall not be accepted for membership" except in accordance with rigorous procedures. *Id.*, Art. II, Sec. 10(B). Barry, as a former ALPA representative (Tr. 235), knew or should have known that requiring the Group of 500 to serve as crossovers could materially jeopardize their opportunity to become members of ALPA at United or elsewhere.

39. United's policy continues to be that the Group of 500 who did not report to work on May 17, 1985 will not become employees of United. Tr. 451, 1165-66.

3. *The Parties' Prestrike Communications to Pilots and Student Pilots*

40. By April 16, 1985, United's planning for the flight operations aspect of a strike had been thoroughly developed, and United decided to engage in an extensive program to communicate certain aspects of the plan to the pilot group. The communications program was briefly summarized in a slide presentation that Barry gave to an assembly of United's corporate officers on April 23, 1985. Pl.Ex. 22. It included: "informational letters/bulletins as needed," "selective canvassing of influential pilots" and "road shows" conducted by Ferris and Barry. The road shows were meetings of pilots at the various domiciles, where Ferris and Barry would discuss United's position in the negotiations

and United's plans for actions which would affect pilots in a strike. Barry testified that one purpose of these road shows was as follows:

> We hoped that might result in individual pilots that were informed and aware of the situation, would influence a settlement, if you will, to try to go back to the ALPA negotiating committee and the MEC and influence them to come to some sort of an agreement with the company.

Tr. 533. Barry further testified that another purpose of the road shows was:

> There was another purpose that we knew that if the pilots struck the company, we were going to have to do some things that were—I will say—rather stern or unusual, and we wanted to make absolutely sure that the pilots understood this and could perceive our resolve in going ahead and accomplishing what we had to do.

Tr. 534.

41. During the 30-day period immediately preceding the strike, United communicated its plans for the pilots through letters and road shows. Although the road shows were sparsely attended, United mailed to all pilots a videotape cassette of excerpts of the May 2, 1985 road shows for pilots domiciled at O'Hare. United communicated the following points to the pilots as part of its effort to bring pressure to bear on the ALPA negotiators:

a. On April 24, Barry sent a letter to all pilots. Pl.Ex. 15. He stated, "if a pilot strike occurs, United will continue to operate. Flight operations will change and opportunities for bidding may open up dramatically." The letter offered

pilots a chance to take training so that they could qualify to bid for captains' jobs in the event of a strike.

b. Barry's April 24 letter also stated that United would hire "permanent replacements for striking pilots." If already qualified to serve as captains or first officers, they would be paid $75,000 or $50,000 per year, respectively, and would be "pay protected" at those rates "even though they may be later reassigned to lower positions.

c. Barry's letter added, "THIS COMPANY INTENDS TO REWARD THE LOYALTY OF THOSE PILOTS WHO HELP US KEEP THIS AIRLINE RUNNING."

d. On May 3, Barry sent another letter to the pilots. Pl.Ex. 16. He stated that striking pilots who reach their retirement date would be ineligible to receive, during their retirement, nonpension retirement benefits such as passes and insurance; that striking pilots who wished to be covered by insurance would have to convert to an "expensive" policy which is "not nearly as comprehensive;" that "striking pilots do not accrue seniority during the period of the strike;" and that "[s]trikers will be ineligible to receive or continue to receive sick leave pay." Finally, Barry stated the following:

> BACK TO WORK AGREEMENT—We will not agree to a back to word agreement which adversely impacts nonstriking pilots or new hire pilots. In fact there is no legal obligation to agree to any back to work agreement. Contrary to what you may have heard, ALPA cannot guarantee that anything will be included in a back to work agreement. We want you to be aware of these policies so that you will recognize how your decision on a work stoppage will affect the benefits you and your family now enjoy. We will hire and train pilots to replace those who elect not to continue working. These new

> pilots will be given a seniority number and will be *permanent* replacements. When and if the strike ends, those who participate in the work stoppage will be able to return *only* to fill vacancies for which they are immediately qualified. Recall will be based on qualification to perform available work, not seniority, and it could be several years, if ever, before striking pilots are returned.

Pl.Ex. 16, pp. 4-5 (emphasis in original).

e. On May 9, 1985, Barry again wrote the pilots to discuss United's plan to "rebid" the airline if a strike occurs. Pl.Ex. 17. He stated in part:

> Only those pilots who accept and perform their first and subsequent duty assignments will be eligible to bid. The first round of bids will be closed as soon as each pilot who maintains continuous service has had an opportunity to bid. Any pilot who has been awarded a bid under this process who subsequently strikes will forfeit his bid.
>
> We will utilize you in your current assignment, unless you can be more productive to the recovery of the airline by being trained into another position. In some cases this may mean a PC in your old equipment. In others it may mean a rating or upgrading in the aircraft you now fly. Ultimately, unless the assignment (domicile, equipment and status) has ceased to exist, you will be trained and activated into your newly awarded assignment. In the meantime, you will be paid the greater of the following: (1) your current assignment, (2) any other position we have assigned you to, or (3) your newly awarded bid, if, on a one-for-one basis, a more junior pilot is functioning in your stead. If

> your service is continuous, we will continue your monthly salary and, also, pay you for any actual hours flown over 81:00.

f. On May 13, 1985, Pringle wrote to the United pilots, setting forth the terms which United intended to implement on May 17 if a strike occurred. Pl.Ex. 18. The terms included a pay raise for all incumbent pilots. Pringle stated:

> Contrary to the misleading information you have received from ALPA, they cannot guarantee any striking pilot will ever be returned. Nor can they promise any striking pilot will not be seriously disadvantaged by the rebidding process which will occur soon after May 17. Nor can ALPA represent there will not be substantial losses in pension and medical benefits for striking pilots.

Pl.Ex. 18. In sending this letter United hoped to encourage pilots not to strike and to influence a settlement. Tr. 969. United also hoped that the proposed pay increase for incumbents would lead pilots to decide against going on strike. Tr. 1044-45.

g. At the O'Hare domicile road show of May 2, 1985, Barry further discussed the planned rebidding of the airline. He stated in part:

> We're going to have to run it on a business basis and to do so, we're going to take some actions. We are going to rebid the airline. I have heard screams —you can't do that. Yes we can and we're going to. We're going to rebid it; we're going to rebid it rapidly. The people that are here on the property are going to be eligible to bid this thing and that those who aren't on the property, are not going to be eligible to rebid. Now what does that mean to

> you. Obviously, if there are bids posted up there when we won the award procedure, there are some people that are going to be out of seniority receive some bids. We won't be able to train them overnight or instantly because we're going to have to run the airline—but I can assure you, that those bids will be honored before we ever award any other vacancies and retrain. They will be honored. We may use them in this emergency period in a different posture and in a different position—we will salary protect them and we will train them when we get this airline back to normal.

Pl.Ex. 53.

h. Ferris also discussed the rebid at the same meeting. He stated:

> But let's assume . . . that 200 guys come back and they are all spread through the seniority list, all right? The day we rebid this air line, if they are the ones on the property, . . . they can bid. You know, if there are only 200 747 captain vacancies, that's what they're going to bid. If they bid that, and they get it, that's theirs, period, never to be released. I'll tell you what, that's powerful inducement, powerful inducement. But, again, I hope that that inducement, you know, isn't what we have to use.

Tr. 469-70.

i. Ferris also discussed the rebid in a meeting with United's training check airmen ("TCAs") in Denver during the cooling-off period. He stated:

> Ferris: What we are going to do is that in about another three, four days, a letter will go out to all pilots, setting forth exactly in black and white the

conditions which existing pilots will come to work for this air line, if they elect to work and not withhold services, all right, very clear, and about 24 hours prior to, not "about," it will be, we start on the phones.

And we're going to tell everybody ahead of time, "get the word out, you better be available to answer the phone," because if they don't, we're going to presume they've elected not to return. We're going to call on the phone and say, "Tomorrow we want you here, at this time, at this hour, here. Are you going to [be] there or are you not?"

The individual is going to have to answer that question. If they say they're going to be there, we'll respect that. If they say they're not going to be there. I will respect that. Then within 24 hours . . . we're not all positive on this yet, depending on how many come, et cetera, we will operate as much of the air line as we can, put that schedule in place, and then, probably, within 24 to 48 hours, we will rebid the air line. So penalty and harm and hurt will begin within 24 hours. (Laughter)

We're not playing around. You will be here to work. You don't show up to work, the harm will hit, and the union will never negotiate that away. Oh, yes, I'll go to the negotiating table, but I don't have to, to give anything away I don't want to give away. And in a back-to-work agreement, when we rebid the air line that's it, it sticks. Does that answer . . .? (Laughter)

Voice: Yes, pretty much.

(Laughter)

> Ferris: You know, what it gets down to, you know, I get a kick out of some of the groups I talk to. It's like they can play hardball and withhold their service and shut down this air line, but I'm supposed to stand here and be a nice guy. Bullshit. I'm going to play tough.

Tr. 726-27.

j. Ferris also discussed United's plans for hiring pilots in the TCA meeting. He stated:

> We have got 500 pre-hires, right? Those pre-hires are all going, they've been given notice, and come 0001 May 17, they're employed, boom. If they don't show up to work, they will never, ever work for this air line, ever, because they're not on the property, they don't have a number, they don't have anything. So 001, these 500 show up to work, okay?
>
> * * * *
>
> And in another two weeks, another 300 right behind them are going to give up their jobs. Guess what? We are going to have on this property 900 employees roughly that we've never seen before. And if you're a second officer, and you elect to withhold your services, I doubt that you'll see this air line again for 20 years. So when you want to play the game, you better know how you are going to play it. I will never forsake anybody that comes to work. I will never forsake their seniority. I will never negotiate it away. All right? If they want to play hard, let's play. But know what game you're getting. . . . The sad part about this, these guys marching up and down the roads like dummies, they don't know what they're into. They don't know the rules. They think it's sweetness and light. And that's sad.

Tr. 728-29.

42. When ALPA learned that United intended to use the Group of 500 as replacements during a strike, Hall sent a letter to the Group of 500 encouraging them not to cross the picket line. Tr. 741-42; Def.Ex. 81. The student pilots also received a report from the Future Aviation Professionals Association, commissioned by ALPA, informing them about the labor dispute at United. Def.Ex. 152; Duffy Dep. at 43.

43. Hall sent letters to various pilot groups encouraging them not to work for United in the event of a strike. Tr. 755-57; Def.Ex. 92.

4. *Prestrike Negotiations*

44. When the parties had failed to reach an agreement by April 15, 1985, the NMB declared an impasse in negotiations and the parties were released from mediation. The NMB offered arbitration to resolve the dispute in accordance with Section 5 of the RLA, 45 U.S.C. § 155. United promptly rejected arbitration. ALPA did not respond. The NMB, on April 16, "released" the parties from mediation, thus commencing the final 30-day "cooling-off" period under the RLA. Tr. 963. United and ALPA continued to negotiate during the 30-day cooling-off period which ended at midnight on May 16, 1985. Tr. 963.

45. During the time that United communicated its strike plans to the pilots, collective bargaining negotiations continued between ALPA and United. United stated that, in the prestrike negotiations, the parties made a "lot of movement . . . with the objective being to try and reach an agreement." Tr. 485, 501.

46. The final prestrike negotiations took place in Boston during the week of May 13. On that date, United made

a new proposal which continued to include its reduced pay scale for new hires. Pl.Ex. 18. On May 14, ALPA reiterated its position that the new-hire scale should exist only for the first five years of the scale and should then "merge" with, or equal, incumbent rates in the sixth year of service. Thomson Dep. at 52. ALPA indicated its agreement to United's rates for the first five years with the intent, as perceived by United, of resolving the new-hire pay issue. Tr. 498.

47. On Wednesday, May 15, the parties addressed their attention to the remaining isues other than the new-hire scale and concluded these other issues by the morning of May 16. Thomson Dep. at 59-60. The only remaining issue was the new-hire pay scale. Stipulation at ¶ 10.

48. Negotiations then resumed on the new-hire pay scale at approximately 1:00 p.m. on May 16. Thomson Dep. at 60-61. United proposed that the parties first reach agreement on the rates for the first five years and then move to the other issues. The ALPA committee suggested that this "piecemeal" approach was not useful in light of the time remaining. The United negotiators agreed. At 2:00 p.m., the parties adjourned to their caucuses. Thomson Dep. at 62.

49. At approximately 6:00 p.m. on May 16, the parties again met at the negotiating table. United made its final prestrike proposal on the new-hire pay scale. Thomson Dep. at 63; Tr. 1046. United proposed that new-hire rates be agreed to for the first five years, and that rates beyond the fifth year be decided through either subsequent negotiations or an agreed-to formula measuring competitive rates in the industry. There could be no merger with incumbent rates until some point after the new-hire pilot began serving as a captain. Stipulation at ¶ 10. The

ALPA negotiators were, in United's words, "extremely disappointed" in United's proposal and told United "that it was not the kind of agreement that they could take back to the UAL-MEC." Thomson Dep. at 67. ALPA suggested that negotiations continue in Chicago, but United now refused to leave Boston unless the ALPA negotiators first agreed to United's proposal. The NMB also objected to leaving. Tr. 975, 1047. Accordingly, the negotiators remained in Boston.

50. During the evening of May 16, representatives of the two sides had a number of off-the-record discussions. Tr. 975-78. Then, at 10:50 p.m. Chicago time, Hall submitted a response to United's last proposal to Ferris, who was in charge of United's negotiating positions. Thomson Dep. at 59. Ferris rejected the proposal and asked that it be transmitted from the ALPA negotiators to United's negotiators in Boston so that they could "formally reject it." Tr. 1261. The UAL-MEC then voted to authorize the strike to commence at 0001 EDT (11:01 p.m. Chicago time). Tr. 1260-61. United made no request to extend the strike deadline. Brashear Dep. at 26, 108. The United negotiators in Boston again rejected the last ALPA proposal. Brashear Dep. at 25-26.

51. After the ALPA proposal was rejected, the ALPA negotiators in Boston asked United to remain in Boston to continue negotiating that night or in the morning. Brashear Dep. at 108-9. United, however, believed that the existence of the strike was a reason not to continue negotiating that night. Tr. 1049-50. Pringle told the ALPA negotiators that he was returning to Chicago, stating his prediction that it would be a long strike and that United would meet with ALPA only as legally required. Tr. 1049-50; Brashear Dep. at 110. United made no counter-proposal to ALPA's final prestrike proposal.

C. The Strike and United's Response

52. Shortly after the strike began, United began to implement its flight operations strike plan, including the rebid of the airline and hiring of permanent replacements. United also began a program of telephoning pilots. A script was given to workers who conducted the calling. Pl.Exs. 23 and 23A. Under that script, if the pilot was not home when called, United would tell the person who answered his phone that, if the pilot did not return the call, he could be "declared a striker and . . . removed from the payroll." If the pilot responded, but indicated that he would not fly, he was told,

> I'm sorry. I need to advise you that if you fail to accept this assignment, we will have no choice but to consider you a striker. As you may or may not know, most company benefits and compensation will be terminated immediately. United will also need to replace you as a pilot.

Pl.Ex. 23 at p. 2. The pilot was also told,

> It has been determined that those pilots who elect to return to work by 1800 Central Time Sunday, 5/19, will be allowed to participate in the rebidding of the airline.

Pl.Ex. 23A.

53. On Sunday, May 19, Ferris told one of the working pilots that it was a "mistake" for ALPA to strike, and that "now they'll have to come back on my terms." Rinaldi Dep. at 21, 39.

54. On Tuesday, May 21, Ferris told one of the striking pilots that the ALPA leadership had "misled . . . , lied to . . . and withheld information from" the striking pilots. Tr. 634. Ferris stated that he was the "1,300 pound

gorilla," that the pilots "couldn't beat him," and that "ALPA was dead on the property." *Id.* Ferris added that "the only way to come back was to cross the picket line," and that "the rebid would stand." Tr. 637. Only about 500 pilots returned to service during the first three days of the strike, while the rebid was open. About half of the returning pilots were management pilots. Tr. 555.

55. During the strike, the ALPA Strike Committee sent a letter and manual to ALPA observer supervisors indicating that observers with cameras should take pictures of pilots and management people who crossed the picket line. Dubisky Dep. at 843; Def.Exs. 111, 163. ALPA proceeded to photograph working pilots during the strike. Stipulation at ¶ 12.

1. *Rebidding the Airline*

56. United's plan to rebid the airline in the event of a strike was one element of its operations adjustment plan. Pl.Ex. 22. To explain this rebid fully, the Court first sets forth several paragraphs from the parties' pretrial stipulation.

> 17. United employs pilots in the status of captain, first officer and second officer. They are employed on Boeing 737, 727, 767 and 747 equipment, and Douglas DC-10 and DC-8 equipment. As of May 16, 1985, each pilot operated from one of nine operating bases known as "domiciles," from which pilot flight assignments originate and to which they return. At that time the bases were Chicago, Cleveland, Denver, Honolulu, Los Angeles, Miami, San Francisco, Seattle and Washington. Some equipment was not operated from certain bases.
>
> 18. Under the 1981 Agreement, a pilot's position is defined as the combination of his status (*e.g.*,

second officer), domicile (*e.g.*, Boeing 727); all pilots in line service hold such a position. Under the 1981 Agreement, vacancies in positions are created by normal attrition and by increasing the total number of positions through expansion of the airline; these vacancies are posted for bid; and the vacancies are then awarded to bidders by seniority. Under the 1981 Agreement, bidders who are not yet qualified to hold the positions awarded to them (*e.g.*, a Boeing 727 second officer needs additional training to serve as a Boeing 727 first officer) are provided the necessary additional training by United; if they qualify and begin line service in the awarded position, that becomes their new position. Sometimes, pilots bid for vacant positions without changing status or equipment merely because they wish to change domiciles.

19. Under the 1981 Agreement, vacancies posted for bid may be and have been from time to time cancelled by United before they are awarded; awarded vacancies may be and have been from time to time cancelled by United before or during training of the pilots to whom the vacancies were awarded.

20. When United reduces its flight operations, it may have an excess of pilots for needed operations. Under the 1981 Agreement, United then declares a surplus, announces a furlough of the surplus junior pilots, strictly according to inverse seniority, and then provides for the bumping of pilots, usually to lower positions, in order to have the correct number of captains, first officers, and second officers for each type of equipment at each base.

Stipulation at ¶ s 17-20.

57. The second officer position is generally regarded as the entry-level position in the airline. Stipulation at ¶ 33. The majority of United pilots seek to become captains. Tr. 282. United believes that it is important to its operations that its first officers and captains be pilots who have progressed through the United system. Tr. 552. To some pilots, choice of domiciles or equipment is also important. Tr. 281-82. Regardless of these varying personal preferences, the essence of the bidding system is the right of pilots to exercise their seniority, as they choose to secure vacancies that are made available. Pl.Ex. 1, Sec. 8(c)(5)(a); Pl.Ex. 43, Sec. 8(c)(5)(a). With the exception of certain bidding restrictions which are not relevant here (*e.g.*, Pl.Ex. 43, Sec. 8(D), Sec. 8(c)(5)(b)), "[T]he most senior pilot bidding on an assignment vacancy . . . shall be awarded such assignment." Pl.Ex. 43, Sec. 8(c)(5)(a).

58. Under the 1981 and 1985 Agreements, United is free to cancel vacancies before they have been awarded or even after they have been awarded if the pilot has not yet been activated in the assignment. The vacancy may be canceled even if the pilot is in training for the assignment. Stipulation at ¶ 19; Tr. 280. United does not regard the award of a vacancy as an "irrevocable promise" that the pilot will be activated in the awarded assignment. Tr. 124. The pilot to whom a vacancy has been awarded, however, is entitled to certain compensation and expenses if someone else is allowed to serve in that assignment after it has been activated. Pl.Ex. 43, Sec. 8(E)(3).

59. Shortly after the strike began on May 17, United canceled all assignments of all pilots, strikers and nonstrikers. Tr. 264, 575. The result of the cancellation was to create vacancies in every position in the airline. United then allowed the nonstrikers, including management pilots,

who reported before 6:00 p.m. Chicago time on May 19, to bid for these jobs, with the exception of the jobs at the Miami and Washington domiciles. Tr. 266, 271.

60. Approximately 525 nonstriking pilots participated in the rebid; about half were management pilots. Pl.Ex. 32D; Tr. 555-56. The vacancies were not awarded until sometime after June 1. Thomson Dep. of June 1, 1985 at 94. During the strike no pilot was activated in any assignment awarded to him in the strike rebid. Tr. 283.

61. United considered the rebid plan an "integral part" of United's total strike plan. Barry, Tr. 312. According to United, the rebid would "diminish the urge for an individual to strike for a few days and return" (Tr. 310), and would create fear in the pilots that they "could be permanently locked out" of their "previous job." With the rebid, a pilot who was considering whether to strike might fear that a junior pilot would "come in at the beginning of the strike, bid for and be awarded [his] job." Tr. 311. Thus, the rebid window was limited to three days, within the "critical phase" planned by United. Tr. 308.

62. The effect of the rebid awards is as follows:

a. The group with the lowest pilot seniority on the airline, those members of the Group of 500 who crossed the picket line and were awarded seniority numbers on May 17, 1985, were awarded DC-10 first officer or various captain positions. The DC-10 assignments represented a gain of at least 2,300 places on a seniority list of 5,800, and the receipt of a position which prior to the strike had only been available to pilots with 19 years service. The captain positions represented a gain of between 2,960 and 5,090 places on the seniority list, and had required before the strike between 19 and 29 years service. Court Ex. 1 at ¶ 43(2); Pl.Ex. 32G.

b. In the lowest paying pilot position on United (B-727 second officer), 25 of 33 rebidding pilots (excluding the new hires) were awarded B-747 second officer or higher paying positions, representing at least an 11-year gain in service (from the median seniority of the B-727 group to the lowest seniority in the B-747 second officer group). Thirty-three of the 37 rebidding pilots had less than the median seniority for the incumbent B-727 second officer group. Prior to the strike, only 4 of the 767 incumbent B-727 second officers had sufficient seniority to hold a B-747 second officer position. The gain in income from B-727 second officer to B-747 second officer is approximately $26,000. Tr. 665; Pl.Ex. 32; Def.Ex. 178.

c. In the lowest paying first officer position (B-737 first officer), 9 of 17 rebidding pilots were awarded DC-8/B-767 captain or DC-10 captain positions, with a 4-year gain in seniority (from B-737 first officer median seniority to lowest DC-8/B-767 captain seniority) and $55,000 gain in pay for DC-8/B-767 captain and 12-year gain in seniority (from B-737 first officer median seniority to lowest DC-10 captain seniority) and $66,000 gain in pay for DC-10 captain. Prior to the strike, only one of 284 B-737 first officers had sufficient seniority to hold any of these captain positions. Pl.Ex. 32; Def.Ex. 178.

d. Thirty-one of 61 rebidding B-727 first officers were awarded DC-10 captain positions. Prior to the strike, none of the 824 incumbent B-727 first officers had sufficient seniority to hold a DC-10 captain position. The gain in years of service from the median seniority of B-727 first officer to the

lowest seniority for DC-10 captain is 10 years. The gain in income from B-727 first officer to DC-10 captain is $60,000 per year. Pl.Ex. 32; Def.Ex. 178.

e. In the DC-8 and B-767 first officer positions, 35 of 57 rebidding pilots were awarded DC-10 captain positions, with a seniority gain of 10 years (from median DC-8/B-767 first officer seniority to lowest DC-10 captain seniority) and salary gain of $51,000 per year. Prior to the strike, none of the DC-8/B-767 first officers had sufficient seniority to hold a DC-10 captain position. Pl.Ex. 32; Def. Ex. 178.

f. In the DC-10 first officer position, 12 of 16 rebidding pilots were awarded DC-10 captain positions with a 9-year gain in seniority (from DC-10 first officer median seniority to lowest DC-10 captain seniority) and $44,000 per year gain in pay. Prior to the strike, one of 272 DC-10 first officers had sufficient seniority to hold a DC-10 captain position. Pl.Ex. 32; Def.Ex. 178.

g. In the lowest paying captain position (B-737 captain), 24 of 37 rebidding pilots were awarded DC-10 or B-747 captain positions, with an 8-year gain in seniority (from median B-737 captain to lowest DC-10 captain seniority) and $32,000 gain in pay (from B-737 to DC-10 captain). Prior to the strike, 10 of 280 B-737 captains had sufficient seniority to serve as a DC-10 or B-747 captain. Pl.Ex. 32; Def.Ex. 178.

h. In the B-727 captain position, 82 of 104 rebidding pilots were awarded DC-10 or B-747 captain positions, with a 5-year gain in seniority (from

B-727 captain median seniority to DC-10 captain lowest seniority) and $24,000 gain in pay. Prior to the strike, 90 of 842 B-727 captains had sufficient seniority to hold a DC-10 or B-747 captain position. Of the 82 rebidding B-727 captains, awarded DC-10 or B-747 captain positions, only 2 had sufficient seniority to hold those positions prestrike, and one of those two had exercised his seniority prestrike to hold a B-727 captain position in Miami, a domicile not utilizing DC-10 or B-747 equipment, which alternative was not available in the system rebid. Pl.Ex. 32; Pl.Ex. 32J, pp. 5-20; Def.Ex. 178.

i. In the DC-8/B-767 captain positions, 17 of 47 rebidding pilots were awarded B-747 captain positions, with a 2-year gain in seniority (from median to DC-8/B-767 captain seniority to lowest B-747 captain seniority) and $31,000 gain in pay. Prior to the strike, 4 of 289 DC-8/B-767 captains had sufficient seniority to hold a B-747 captain position. Pl.Ex. 32; Def.Ex. 178.

j. While the system rebid did not serve as a positive inducement to those already holding the highest paying positions they were eligible to or preferred to hold (*e.g.*, B-747 captain; B-747 second officer for those older than 60; equivalent DC-10 positions for those wishing to fly in a domicile not utilizing B-747 equipment), the coercive element of the rebid for these pilots, particularly B-747 captains, was particularly acute. The combination of the announced rebid and recall policies made it highly unlikely that these pilots would ever work again for United. Pl.Ex. 32E; Def.Ex. 178; Tr. 469-70, 729.

63. The disadvantages to striking pilots results from the fact that the rebid will have the general effect of blocking new vacancies which will arise after the strike and would otherwise have been awarded to pilots who participated in the strike and have greater seniority than nonstrikers awarded similar assignments in the rebid. Tr. 668. In particular, almost all assignments in the two highest paying positions on the airline, B-747 captain and DC-10 captain, will be awarded to nonstrikers. Pl.Ex. 32E; Pl.Ex. 32D.

64. While attrition in current B-747 captain ranks as a result of disqualification by the Federal Aviation Administration Age 60 Rule, 29 CFR § 121.383(c), will produce 46 B-767 captain vacancies over the next two years, all of these vacancies will be filled by nonstrikers who did not occupy a B-747 captain position prior to the strike. Tr. 673; Pl.Ex. 32H. Of the 55 nonstrikers who were not B-747 captains prior to the strike and were awarded a B-747 captain position in the rebid, only two had sufficient seniority to serve as a B-747 captain prior to the strike. Pl.Ex. 32; Pl.Ex. 32H; Pl.Ex. 32J, pp. 8, 9) and 15 had seniority numbers in the range of the two hundred places below the most junior B-747 captain prestrike (seniority numbers 254-455). Pl.Ex. 32; Pl.Ex. 32J, pp. 11-14.

65. The impact of the rebid on B-747 captain vacancies will continue beyond two years (Tr. 673), since the younger rebidders may occupy these seats until age 60. The youngest rebidder does not reach age 60 until 1994. Tr. 674. The rebid blocks 211 DC-10 captain positions well into the future. Pl.Ex. 32, p. 7; Pl.Ex. 32D; Tr. 675.

66. While expansion in the flying of B-747 or DC-10 equipment will create additional captain vacancies, such expansion does not change the impact of the system rebid

but merely shifts it from one part of the seniority list to another. Tr. 675-76.

2. *Higher Salaries for Permanent Replacement Pilots*

67. Prior to the strike, United placed advertisements for what it called "fleet-qualified permanent replacement pilots." These pilots were already qualified to serve as captains or first officers on the kind of jet equipment flown by United. Pl.Ex. 13. United offered to pay candidates rates of $75,000 per year for captains and $50,000 per year for first officers. *Id.* These rates were guaranteed minimums, so long as the pilots were employed by United, although after the strike they could be required to serve as second officers where the normal rates of pay for new-hire second officers would be substantially less. Pl.Ex. 18; Pl.Ex. 43, Sec. 3.C.

68. The maximum fifth-year rate of pay for new-hire second officers under the 1985 Agreement is $39.74 per hour for 81 hours monthly, or $38,627 per year. Even if some permanent replacements achieve a B-737 or B-727 first officer position prior to the amendable date (which has taken a minimum of five years in the past), the third-year rate of pay for a B-727 first officer is $42.31 per hour for 81 hours monthly, or $41,125 per year, which is still less than the guarantee for "fleet qualified."

69. Some of the offers made to the replacement pilots contained reporting dates which fell after the strike ended. Tr. 1302. United presently intends to honor the pay commitments if the pilot reported as scheduled, although the pilots did not work or undergo training during the strike. Tr. 64, 1150. These pilots were advised that, on the conclusion of the strike, they might be demoted to second officer in accordance with their standing on the seniority list.

D. Post-Strike Negotiations and Settlement

70. On May 20, United agreed to resume negotiations with ALPA. Within two to three days, the parties reached a tentative agreement on the new-hire pay scale issue. Tr. 983-84; Pl.Ex. 43, Sec. 3(B)(1)(C).

71. After the negotiators concluded the tentative agreement on the economic package, they turned their attention to the terms of a back-to-work agreement. Negotiations continued on May 23, 24 and 25. By the morning of May 25, the parties were separated by four, or possibly, five issues. Specifically, ALPA proposed that United not implement the system rebid which it had conducted May 17-19; that the fleet-qualified permanent replacements be paid in accordance with the contractual rates of pay, rather than the $75,000 and $50,000 rates specified by United; that United place into service the Group of 500 pilots whom United had trained prior to May 17 but who refused to cross the picket lines during the strike; and that United restore to their jobs several TCAs who had honored the ALPA picket lines as line pilots on the pilot seniority list. Tr. 987; Def.Ex. 52.

72. All of the above issues were discussed at the bargaining table on May 23-25. Tr. 987-995. United's positions were that it intended to (1) implement the rebid; (2) continue paying the premiums to the permanent replacements; (3) refuse to replace the striking TCAs into their prestrike positions; and (4) refuse to employ the Group of 500. Tr. 1065-66. United had not yet awarded the results of the rebid. Thomson Dep. at 94.

73. United's stated reason for its position on the Group of 500 was that to allow the Group to return would "strategically hurt us [United] in trying to operate through future strikes. . . ." Tr. 1081. United asserts that it had

told these individuals that if there were a work stoppage, they were expected to "go to work and fly their first trip." Tr. 514. According to United,

> [I]f the corporation were to make statements and then turn around and just willy-nilly say: well, those statements don't mean anything in a back-to-work agreement, they are just all gone, we don't live up to these things, then where is this corporation's position for the future? We don't want another work stoppage, but what if one occurred? Where would our ability be to hire permanent replacements if we did not live by our word? This corporation's word is its bond and it must live by it.

Tr. 493.

74. The parties also discussed in the May 23-25 negotiations the question of how United would handle its dispute with the Association of Flight Attendants ("AFA"), who had honored the ALPA picket lines. ALPA's position was that its back-to-work agreement with United should be made contingent on United and the AFA "reaching a Back-to-Work Agreement". Def.Ex. 52 at ¶ 18. This was in keeping with a commitment that ALPA made when it requested AFA to respect the ALPA strike. At that time ALPA stated:

> In the event ALPA withdraws its services on United Airlines, please be advised that ALPA will, should the Flight Attendants support our effort and honor our picket line, pledge not to return our members to work at the conclusion of our strike until such time as an appropriate return-to-work agreement is negotiated on behalf of AFA's membership.

Def.Ex. 57. United negotiated with ALPA as to the AFA issue. Tr. 1067. United's position was that it would meet

with AFA and work out or attempt to work out a back-to-work agreement. Tr. 1067. So far as ALPA was concerned, United's statement constituted a verbal understanding that United would meet with AFA to discuss their back-to-work agreement. Brashear Dep. at 44; Pl.Ex. 91. United disputes that there was a verbal understanding and accuses ALPA of misleading the federal mediators to believe that there was. Tr. 1070-71.

75. In the morning of May 25, with four or five open issues separating the parties, the back-to-work negotiations broke off. On June 4, 1985, the NMB requested United and ALPA to resume negotiations. Tr. 996. United promptly refused, asserting that it would not even return to the table until ALPA first withdrew "demands" regarding the Group of 500, AFA back-to-work agreement, and former TCAs. Def.Ex. 53. United described the strike as "frivolous" and stated that it would be "free to re-evaluate" terms of the tentative agreement "in the near future" if the strike continued. *Id.*

76. By June 10, 1985, United returned to mediation as a result of a conversation between representatives of the two parties. Tr. 997. On June 12, the federal mediator presented a back-to-work proposal which was accepted by the two sides, subject to ratification by ALPA. Pl.Ex. 43. ALPA agreed to expedite its normal ratification process, and United agreed that the proposal would be binding through June 15, 1985. *Id.*, ¶¶ 1 and 16.

77. The back-to-work agreement provided that striking pilots would be offered a return to the active payroll effective the day after notification to United that ratification had occurred, and that the pilots would be returned to the same domicile, status, and equipment to which they were assigned on May 16 with normal accrual of seniority. The

parties agreed that neither would "engage in or condone any activities which might constitute reprisals or recriminations as a result of the ALPA strike," that United would withdraw charges or discipline against pilots for strike-related activities and would take no further action against ALPA or pilots for these activities, and that ALPA would take no disciplinary action against nonstriking pilots. Finally, United agreed that ALPA would pursue its claims regarding the Group of 500, rebid and replacement pay in this Court.

78. On June 12, the UAL-MEC was called into session. Tr. 1252. Although no written copy of the tentative agreement or Mediator's proposal was yet available, the UAL-MEC was given a general briefing on the contract and legal issues involved in the settlement. Tr. 1253. On June 13, the documents were made available to the UAL-MEC, which received an extensive briefing on all issues, including the basic contract terms, from the ALPA negotiating committee. Tr. 1255. On June 14, the UAL-MEC received further detailed legal briefing from counsel, and debate over the proposed settlement began.

79. Around 9:15 p.m. on June 14, the AFA reported to the UAL-MEC that AFA's back-to-work negotiations with United had broken down, and that the flight attendants would return to work without a back-to-work agreement. Tr. 1256. AFA "released" the UAL-MEC from its earlier pledge that it would not return the pilots to work unless the flight attendants were also protected in their own back-to-work agreement. Tr. 1258). The UAL-MEC then debated the question whether the UAL-MEC should defer any vote on ratification until the UAL-MEC members had taken the settlement back to their local councils to seek membership input. Although it initially appeared that this would be done, there was concern that United might with-

draw the offer if it was not ratified by midnight June 15. As a result, the UAL-MEC first voted that it would decide the ratification issue on the evening of June 14, then voted to ratify. Tr. 1259. This ended the strike.

80. At the conclusion of the strike, United restored all pilots to their prestrike assignments. Tr. 293, 297, 1231. As a result, the vacancies that United created at the beginning of the strike no longer exist. Tr. 297, 1231. When new vacancies arise in the future, due to attrition from the pilot ranks or expansion of flying at a domicile, United intends to award those vacancies in seniority order to nonstriking pilots who had received awards of comparable vacancies during the strike. Tr. 293. United will do so even if a more senior striker wishes to bid for and receive the new vacancy. Tr. 1232-33. United intends to grant a preference for new vacancies to nonstriking pilots. Tr. 296-97.

81. United's policy with respect to the Group of 500 who did not report to work on May 17, 1985, is that they will never become United employees. Tr. 451, 1165-66.

82. United expects to expand and will need additional pilots. Tr. 121, 551. United has already offered second officer jobs to nearly 700 additional pilots, of whom only about 300-350 entered training during the strike. Tr. 246-47. The remaining pilots would enter training after the strike was settled. Nonetheless, United's position as expressed to the Court is that it will not employ any of the Group of 500 who refused to cross the picket lines during the strike. Tr. 56. United's policy is that "this Group of 500 will not be employed by United." Tr. 121. The only possible exception to this policy is that if the individual did not report on May 17 due to "personal hardship" or "extenuating circumstances," he or she would be "offered

employment." Tr. 251. United, however, will not consider those who failed to report on May 17 "if their reason for failing to show up for work was a refusal to cross the picket line." Tr. 366.

83. United presently intends to continue paying fleet qualified permanent replacement captains and first officers $75,000 and $50,000, respectively, notwithstanding contrary rates set by the 1985 Agreement and notwithstanding the fact that the permanent replacements may, in the future, be demoted to second officers.

84. United has recently agreed in principle to purchase the Pan American World Airways Pacific Division for $750 million. Tr. 508. UAL, Inc. has recently agreed to purchase the Hertz Corporation for $587.5 million. Tr. 509. United has begun a process to recapture from employee pension funds certain asserted overfunding in the amount of $950 million. Tr. 510. United has agreed to purchase 25 Boeing-737 aircraft from Frontier Airlines. Tr. 1281. United may soon purchase from the Boeing Company approximately 20 new B-767 aircraft. Tr. 1281.

85. To the extent that any of the foregoing findings of fact are deemed to be conclusions of law, they are hereby adopted as conclusions of law.

II. CONCLUSIONS OF LAW

A. *Applicable Law*

1. This action arises under, and is governed by, the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.* ("the RLA"). The Court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1337.

2. Section 152, First of the RLA provides, in part, that it shall be the duty of both management and labor "to exert

every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes . . . in order to avoid any interruption to commerce. . . ." 45 U.S.C. § 152, First (hereinafter "Section 2, First").

3. Section 152, Third of the RLA provides, in part, that representatives, for the purposes of collective bargaining, "shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives." 45 U.S.C. § 152. Third (hereinafter "Section 2, Third").

4. Section 152, Fourth of the RLA provides, in part, that "[e]mployees shall have the right to organize and bargain collectively through representatives of their own choosing." Furthermore, Section 2, Fourth mandates that "[n]o carrier . . . shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees . . . , or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization. . . ." 45 U.S.C. § 152, Fourth (hereinafter "Section 2, Fourth").

5. Section 152, Fifth of the RLA provides, in part, that "[n]o carrier . . . shall require any person seeking employment to sign a contract or agreement promising to join or not to join a labor organization." 45 U.S.C. § 152, Fifth (hereinafter "Section 2, Fifth").

6. Finally, Section 152, Seventh provides that "[n]o carrier . . . shall change the rates of pay, rules, or working

conditions of its employees, as a class, as embodied in agreements [except as provided in 45 U.S.C. § 156]." 45 U.S.C. § 152, Seventh (hereinafter "Section 2, Seventh").

7. As the Supreme Court has repeatedly stated, the heart of the Railway Labor Act is the duty, imposed by Section 2, First upon management and labor, "to exert every reasonable effort to make and maintain agreements . . . and to settle all disputes . . . in order to avoid any interruption to commerce. . . ." *Chicago & North Western Railway Co. v. United Transportation Union,* 402 U.S. 570, 574, 91 S.Ct. 1731, 1734, 29 L.Ed.2d 187 (1970); *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.,* 394 U.S. 369, 377-78, 89 S.Ct. 1109, 1114-15, 22 L.Ed.2d 344 (1969). To that end, the RLA provides a detailed framework to facilitate the voluntary settlement of major disputes. The parties must give advance notice of proposed changes, confer to discuss the proposals and submit to the mediation services of the National Mediation Board. If either party rejects the Board's offer of arbitration, the President may create an emergency board to investigate the dispute. While the dispute is "working its way through these stages, neither party may unilaterally alter the *status quo.*" *Jacksonville Terminal, supra,* 394 U.S. at 378, 89 S.Ct. at 1115 (*citing* Sections 2, Seventh; 5, First; 6 and 10).

8. After the statutory procedures of the RLA have been exhausted, the parties are free to "employ the full range of whatever peaceful economic power they can muster, so long as its use conflicts with no other obligation imposed by federal law." *Id.* at 392, 89 S.Ct. at 1123. The RLA, however, imposes two competing obligations upon a carrier in the event of a strike. First, the carrier has a duty to make all reasonable efforts to continue its operations during a strike. Section 2, First; *Railway & Steamship Clerks v. Florida East Coast Railway Co.,* 384 U.S. 238, 246-47, 86 S.Ct. 1420,

1424-25, 16 L.Ed.2d 501 (1966). That duty is grounded in the policy expressed by the RLA of avoiding the interruption of commerce. That duty, however, must be weighed against another duty: maintaining the continuity of the employer-employee relationship. *Florida East Coast, supra,* 384 U.S. at 247, 86 S.Ct. at 1425; *Empresa Ecuatoriana de Aviacion, S.A. v. District Lodge,* 690 F.2d 838 (11th Cir. 1982). That relationship, like the collective bargaining agreement which memorializes the relationship, "is not destroyed by the strike, as the strike represents only an interruption in the continuity of the relation." *Florida East Coast, supra,* 384 U.S. at 246-47, 86 S.Ct. at 1424-25. When a strike occurs, the carrier is placed into the admittedly precarious position of balancing its "twin obligations to serve the public and to attempt reasonably to maintain the employer-employee relationship." *Empresa, supra,* 690 F.2d at 845. These "twin obligations" are enforceable by the judiciary, and the carrier's conduct during a strike must withstand judicial scrutiny under the obligations imposed by the RLA. *Chicago & North Western Railway, supra,* 402 U.S. at 574, 91 S.Ct. at 1733. "While the carrier has the duty to make all reasonable efforts to continue its operations during a strike, its power to make new terms and conditions governing the new labor force is strictly confined, if the spirit of the Railway Labor Act is to be honored." *Florida East Coast, supra,* 384 U.S. at 247, 86 S.Ct. at 1425.

9. In considering the general boundaries of permissible self-help under the RLA, the Court may resort to the National Labor Relations Act, 29 U.S.C. §§ 151, *et seq.* ("NLRA") for assistance. *Jacksonville Terminal, supra,* 394 U.S. at 391, 89 S.Ct. at 1122. To the extent, however, that the policies of the RLA and NLRA differ, the Court may not incorporate into the RLA the "panoply of detailed law developed by the National Labor Relations Board and

courts under [the NLRA]." *Id.* at 391, 89 S.Ct. at 1123. For example, the Court in *Jacksonville Terminal* refused to incorporate the NLRA's prohibition to incorporate the NLRA's prohibition against secondary boycotts into the RLA because Congress had expressly refused to enact a provision similar to § 8(b)(4) of the NLRA into the RLA. *Id.*

B. *The Group of 500*

10. Section 2, Third and Fourth of the RLA create judicially enforceable rights of employees to be free from carrier coercion based on union activity. *Conrad v. Delta Air Lines, Inc.*, 494 F.2d 914 (7th Cir. 1974). In *Conrad*, the court construed Section 2, Fourth to protect a probationary pilot from discharge during the term of a collective bargaining agreement in retaliation for his "overactivity" as an apprentice member of ALPA, the designated bargaining representative of Delta pilots. In doing so, the court relied on authority applying §§ 8(a)(1) and (2) of the NLRA. Section 2, Fourth is therefore comparable to §§ 8(a)(1) and (2) of the NLRA. *See also Brotherhood of Railroad Trainman v. Georgia Railway Co.*, 305 F.2d 605 (5th Cir. 1962).

11. Section 8(a)(3) of the NLRA prohibits employer discrimination "to encourage or discourage membership in any labor organization." Section 2, Fourth of the RLA prohibits employer coercion of employees "to induce them to join or remain or not to join or remain members of any labr organization." Although literally addressing only union "membership," both sections are broadly construed to protect a wide range of union-related activity. Indeed, the Supreme Court has held that under § 8(a)(3), discrimination to discourage "membership" in a union "includes discouraging participation in concerted activities . . . such as a

legitimate strike." *N.L.R.B. v. Erie Resistor Corp.*, 373 U.S. 221, 233, 83 S.Ct. 1139, 1148, 10 L.Ed.2d 308 (1963)). There is no basis in the language of the RLA to construe Section 2, Fourth more narrowly than § 8(a)(3) of the NLRA. It is inconceivable that the railroad unions, which negotiated the terms of the RLA as enacted in 1926, and Congress, which enacted Section 2, Fourth in 1934, intended the right to strike to be "integral to the Act" and "within the core of protected self help," but at the same time did not intend any statutory protection against employer retaliation for engaging in a lawful strike. Accordingly, cases construing section 158(a)(1) and (3) may be applied, by analogy, to the facts of this case.

12. United, however, argues that the Group of 500 were not employees, and thus, have no judicially enforceable rights under Section 2, Third or Fourth. The RLA defines "employee" as including "every person in the service of the carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee. . . ." 45 U.S.C. § 151, Fifth. The Supreme Court has stated that the term "employee" should be broadly interpreted to fulfill the intent of Congress to regulate the entire employment relationship. *Pennsylvania Railroad Co. v. Day*, 360 U.S. 548, 551-52, 79 S.Ct. 1322, 1324, 3 L.Ed.2d 1422 (1959). *See also Air Line Pilots Assoc., International* v. *Alaska Airlines, Inc.*, 735 F.2d 328 (9th Cir. 1984).

13. United admits that its treatment of the Group of 500 was radically different than its treatment of student pilots in the past. Prior to the Group of 500, all student pilots were "employees" from the first day of training. Furthermore, student pilots accrued pilot seniority from their first date of service as a student pilot. The Group of 500 were trained in substantially the same manner as prior

student pilots with the principal exception that United referred to the Group of 500 as "nonemployees."

14. Despite the significant differences between United's training of the Group of 500, contradictory statements regarding the employment status of Group members, free training at considerable cost to United, and $30 per day expense allowance given to Group members, the Court rejects ALPA's argument that the Group of 500 were employees of United upon their first day of training. Unlike prior United trainees, no one in the Group of 500 was paid a salary during his or her training. Furthermore, the training agreements entered into between Group members and United expressly provided that the student pilot was not an employee of United during training. *See e.g.*, Def.Ex. 140.

15. Although the Court rejects ALPA's argument that the Group of 500 became employees upon their initial date of training, the record is clear that all members of the Group of 500 had accepted United's offer of employment effective May 17, 1985. After Group members accepted United's offer of employment, United informed the student pilots that their change to "permanent status" would occur on May 17, 1985. Pl.Ex. 6. Although United may condition those offers upon the student pilot's successful completion of training, United's belated attempt to require members of the Group of 500 to cross a lawful picket line as a condition of employment is unlawful under the RLA.

16. Physically reporting to work to establish an employer-employee relationship is not a prerequisite to the right to strike on the first day of employment. In *N.L.R.B. v. New England Tank Inc.*, 302 F.2d 273 (1st Cir. 1962), the employer had obtained a contract to take over operations on a gas pipeline but refused to hire most of the employees of the previous operator of the pipeline because of their

union activities. The employer did offer employment to three, each of whom accepted but later refused to report to work on the first day in protest of the employer's refusal to hire the others. The court, interpreting § 8(a)(1) and (3) of the NLRA, rejected the employer's argument that the three "had never actually effectuated an employer-employee relationship with the company and therefore could not 'strike' against it." *Id.* at 277. Although acknowledging that the individuals "never actually reported to work" for the employer (*Id.* at 277), the court held:

> On the present record to insist on a requirement that the three men physically report to the job before going on strike would be little more than an empty gesture.

Id. at 278.

17. Similarly, all of the Group of 500 had accepted unconditional offers of employment from United, with an effective date of May 17, 1985. United's later insistence that they physically report to the training center on their first day in order to become employees with the right to strike is precisely the same "empty gesture" rejected in *New England Tank*. United's attempt to manipulate the "employee" status of the Group of 500 with formalities does not justify applying Section 2, Fourth to deny employees the right to participate in a lawful strike on their first day of employment. Accordingly, the Group of 500 became employees of United May 17, 1985, their pilot seniority accrues as of that date, and their rates of pay are to be determined by the new-hire wage scale set forth in the 1985 Agreement.

18. Even assuming that the Group of 500 were not employees on May 17, 1985, or assuming that § 8(a)(1) and (3) are inapplicable to this case, United's conduct would be unlawful under the RLA because United unilaterally

altered the *status quo* by instituting the "nonemployee" training program for the Group of 500. This conduct, alone, violates Section 2, Seventh of the RLA.

19. United could not have lawfully changed its historic practices and contractual commitments after it served its notice of intended change in the 1981 Agreement pursuant to RLA § 6, 45 U.S.C. § 156. After service of a § 6 notice, "neither party may unilaterally alter the *status quo*." *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 378, 89 S.Ct. 1109, 1115, 22 L.Ed.2d 344 (1969). The *status quo* provision broadly covers even non-contractual working conditions. United cannot bargain in good faith on the new-hire wage issue while, *at the same time*, train over 500 "nonemployees" to be hired under the lower wage rate of a new contract. The training of the Group of 500 is not only evidence of bad faith bargaining, but it is clearly a violation of United's obligation to keep the *status quo* during negotiations. The obligation imposed on both parties,

> is to preserve and maintain unchanged those *actual, objective working conditions and practices*, broadly conceived, which were in effect prior to the time the pending dispute arose and which are involved in or related to that dispute.

Detroit and Toledo Shore Line Railroad Co. v. *United Transportation Union*, 396 U.S. 142, 152-53, 90 S.Ct. 294, 301, 24 L.Ed.2d 325 (1969). United, in effect, abrogated the contract with respect to all those pilots for whom the point of transition from student pilot to line pilot was altered by United's unilateral change in policy. United cannot rely on its own unlawful conduct to justify depriving the Group of 500 of their employee status and the protections of the RLA.

20. Furthermore, United's treatment of the Group of 500 was unlawful (even if the Court were to assume they were not employees on May 17) because United violated Section 2, Fifth of the RLA, which provides that no carrier "shall require *any person* seeking employment to sign any contract or agreement promising to join or not to join a labor organization." (Emphasis added.) The protection of Section 2, Fifth, thus extends to "any person" and not just "employees." By making employment contingent on crossing the picket line, United has violated Section 2, Fifth by requiring "persons" not to join the union or its activities. United was clearly aware that requiring the student pilots to cross a lawful picket line would disqualify them from future union membership.

21. The language in Section 2, Fifth prohibiting agreements to "join or not to join a labor organization" is virtually identical to that enacted the same year in Section 2, Fourth, and to that enacted a year later in NLRA § 8(a)(3), and, accordingly, must be construed broadly, as are the latter two provisions, to cover a wide range of union activities. Even limited to its literal terms, however, Section 2, Fifth, covers United's attempt to coerce a promise not to respect ALPA's picket line.

22. The NLRA reflects the same concern about prehire discrimination on the basis of union membership or activity. In *Phelps Dodge Corp.* v. *N.L.R.B.*, 313 U.S. 177, 188, 61 S.Ct. 845, 849, 85 L.Ed. 1271 (1941), the Court emphatically rejected an employer's attempted distinction between "discrimination in denying employment and in terminating it" as being in defiance of basic policies under the NLRA. The Court recognized that discrimination at the

time of hire violated the policy of protecting workers' right to self-organization, and stated:

> Such a policy is an inevitable corollary of the principle of freedom of organization. Discrimination against union labor in the hiring of men is a dam to self organization at the point of supply. The effect of such discrimination is not confined to the actual denial of employment; it inevitably operates against the whole idea of the legitimacy of organization.

Id. at 184-85, 61 S.Ct. at 848. The RLA plainly embodies the same policies. Section 2, Third, Fourth, and Fifth collectively are expressly designed to protect from employer coercion workers' rights to organize and act collectively both before and after the date of formal hire. Section 2, Fifth, therefore, should not be given a narrow interpretation and must be read as prohibiting an employer from refusing to hire an individual on the basis of his union activity.

23. United's final justification for its policy toward the 500 is that allowing them to return would hamper its ability to hire "permanent replacements" in the event of future strikes. This justification, however, is not convincing. United established a program for hiring permanent replacements. The jobs advertised to these individuals were openly contingent on a strike taking place. This included the hiring of new second officers, as to whom job offers were made to be effective "only in the event of a strike." In contrast, United's program for the Group of 500 was to hire them when a contract was reached, and the job offers of April 20 were not contingent on working during a strike. *Compare* Pl.Exs. 8 and 12 *with* Pl.Exs. 13 and 14 and Def.Exs. 71 and 72. United advised some members of the

Group of 500 that they would not be required to work during a strike. In fact, United admits that it did not hire the Group of 500 to be "crossovers." Tr. 50. It was only after the Group of 500 had returned to Denver that United attempted to coerce them into serving during the strike. Requiring United to restore the Group of 500 will not preclude United from honestly and openly advertising for, hiring and training permanent replacements if it becomes enmeshed in another labor dispute with ALPA or any other labor organization.

24. In summary, the Group of 500 were employees of United on May 17, 1985. United's condition that the student pilots cross a picket line on their first day of work was unlawful. Since the union remains the bargaining representative for "all employees in the designated craft, whether union members or not" (*Railway Clerks* v. *Florida East Coast*, 384 U.S. 238, 246, 86 S.Ct. 1420, 1424, 16 L.Ed.2d 501 (1966)), United's contention that ALPA lacks standing to assert claims on behalf of the Group of 500 is without merit. *See also Burke* v. *Compania Mexicana de Aviacion*, 433 F.2d 1031, 1033 (9th Cir. 1970).

B. *Rebidding the Airline*

25. As of the first day of the strike, United canceled all prestrike job assignments and posted the vacancies created by that cancellation for rebidding. Only nonstriking pilots were eligible to bid for the newly opened up jobs. At the conclusion of the strike, United agreed to return all pilots to their prestrike assignments, thereby eliminating the vacancies posted for rebid. Now that the strike is settled, United will fill new vacancies which will arise after the strike is over, granting to nonstriking pilots who participated in the rebid priority over former striking pilots with higher seniority. Many of the nonstrikers will obtain

positions that they could not hold by exercising their seniority, and would not be able to hold for many years. Returning strikers will be barred from exercising their seniority to bid for new vacancies in positions permanently awarded to nonstrikers, even though those nonstrikers may have lesser seniority than the strikers.

26. After the RLA procedures for resolution of a major dispute have been exhausted, the parties may employ "the full range of whatever peaceful economic power they can muster, so long as its use conflicts with no other obligation imposed by federal law." *Jacksonville Terminal, supra,* 394 U.S. at 392, 89 S.Ct. at 1123. The RLA, however, imposes "twin obligations" upon the carrier to serve the public by reasonably attempting to operate during a strike and reasonably attempting to maintain the employer-employee relationship. *Empresa, supra,* 690 F.2d at 845. The employer-employee relationship is "not destroyed by the strike, as the strike represents only an interruption in the continuity of the relation." *Florida East Coast, supra,* 384 U.S. at 246-47, 86 S.Ct. at 1424-25. "While the carrier has the duty to make all reasonable efforts to continue its operations during a strike, its power to make new terms and conditions governing the new labor force is strictly confined, if the spirit of the Railway Labor Act is to be honored." *Id.* at 247, 86 S.Ct. at 1425. *See also Hendricks, supra,* 696 F.2d at 677.

27. In *Empresa, supra,* 690 F.2d 838, the court held that the RLA permitted a carrier to replace striking employees only "as needed in order to continue to meet its cargo and passenger flight schedules, perform its necessary internal business functions, and avoid losing customers and revenue to competitors." *Id.* at 844. The court stressed, however, that there was no evidence of punitive conduct on the part of the carrier during the strike. *Id.* at 845.

28. Similarly, § 8(a)(1) of the NLRA protects from employer interference the "rights of employees to engage in concerted activities, which . . . include the right to strike." *N.L.R.B. v. Erie Resistor Corp.*, 373 U.S. 221, 233, 83 S.Ct. 1139, 1148, 10 L.Ed.2d 308 (1963). Section 8(a)(1) of the NLRA is analogous to Section 2, Fourth of the RLA. *See* ¶ s 10 and 11, *supra.* Accordingly, cases interpreting § 8(a)(1) are helpful in defining a carrier's rights and responsibilites under Section 2, Fourth of the RLA.

29. In this case, the granting of permanent super-seniority to replacement pilots cannot be viewed by the Court as "needed" for the continued operation of United during the strike. Additionally, the super-seniority granted to replacement pilots will continue to disadvantage striking pilots for many years. As the Supreme Court noted in *Erie Resistor, supra,* 373 U.S. 221, 83 S.Ct. 1139, 10 L.E.2d 308, "super-seniority by its very terms operates to discriminate between strikers and non-strikers, both during and after a strike, and its destructive impact upon the strike and union activity cannot be doubted." *Id.* at 231, 83 S.Ct. at 1147.

30. The claimed business justifications offered by United are insufficient to outweigh the inherently destructive effects of the rebid. United's rebid policy not only accomplishes all the evils outlined by the Court in *Erie Resistor,* but it operates even more effectively than the limited form of super-seniority in that case. In contrast to *Erie Resistor,* where the super-seniority became effective, if ever, only in the event of future layoffs, the benefits and punishments of United's post-strike implementation of the rebid will have an ongoing, daily effect on the rates of pay, job status, and benefits of both those nonstrikers who will occupy the rebid jobs and those strikers who will be blocked

from those jobs. Nonstrikers will be able to obtain positions in the system substantially better than those which their seniority would permit. Strikers will be blocked from bidding for many of the best jobs in the system which were awarded to nonstrikers. Thus, if the form of super-seniority in *Erie Resistor* was so destructive of the right to strike as to be unjustifiable by business necessity, United's more effective version is even less justifiable.

31. United's argument that crossover pilots are equivalent to permanent replacements and may therefore retain their job bids after the strike is also without merit. In each of the cases cited by United in support of its argument, the crossovers actually occupied and worked in the positions in question during the strike. In fact in one of the cases, *International Assoc. of Machinists v. J.L. Clarke Co.*, 471 F.2d 694, 698 (7th Cir.1972), the court emphasized that in order for a crossover to be entitled to a job assigned during a strike, the employer must prove that the replacement actually occupied the position during the strike. The same principle applies under the RLA. Since an employer's right to hire replacements is based only on its needs to "continue in business," its right to fill positions permanently is limited to those actually occupied and used to continue in business during a strike. In this case, however, no United pilot worked in a rebid position during the strike; rather, United plans to implement the rebid awards to nonstrikers only when new vacancies in those positions has ended.

32. In addition to the fact that United has failed to justify the rebid as reasonably necessary for its operations during the strike, ALPA has established specific evidence of United's intent of coercion and discrimination against union membership by virtue of the rebid procedure. "Such proof itself is normally sufficient to destroy the employer's claim of a legitimate business purpose. . . ." *Erie Resistor*,

supra, 373 U.S. at 227-28, 83 S.Ct. at 1145; *Conrad, supra* 494 F.2d at 918. United's plan to rebid the airline was part of the operations adjustment plan, a plan which was intended to break the strike by causing a "stampede" of striking pilots to cross the picket line. Tr. 302-04; 343; 464. Furthermore, United's stated policy at the time of the strike regarding its permanent replacements was that it intended to "reward the loyalty of those pilots who help us keep this airline running." Pl.Ex. 15. Finally, Ferris warned pilots shortly before the strike that the rebid would result in "penalty and harm and hurt" to striking pilots within 24 hours after the strike. "You don't show up for work, the harm will hit." Tr. 726-27. United's anti-union motivation in connection with the rebidding of the arline invalidates the procedure notwithstanding other legitimate motives. *Conrad, supra,* 494 F.2d at 918.

33. United's reliance upon *Giddings & Lewis, Inc. v. N.L.R.B.,* 675 F.2d 926 (7th Cir.1982), does not warrant a contrary result. In *Giddings,* the employer, faced with a strike which lasted more than a year, hired 323 permanent replacement workers. When the strike ended, the employer refused to reinstate a replaced striker but did agree to place the replaced strikers on a preferential hiring list. In the event of future layoffs, however, the employer's position was that permanent replacements and reinstated strikers would not lose their positions to more senior unreinstated strikers. The court held that the layoff procedure would not violate the NLRA because the employer was not discriminating against strikers in favor of nonstrikers. In this case, the striking pilots have been reinstated to their pre-strike positions; therefore, *Giddings* is inapplicable. Since United will continue to discriminate against the reinstated striking pilots by virtue of the super-seniority awarded to nonstrikers, the rebid was unlawful.

C. *Higher Salaries for Permanent Replacement Pilots*

34. Fleet-qualified permanent replacement captains and second officers are presently being paid annual salaries of $75,000 and $50,000, respectively. These rates are in excess of the new-hire rates under the 1985 Agreement. ALPA argues that whatever business justifications may have existed during the strike for offering "superpay" to incoming pilots, the inherently destructive post-strike implications of such a plan outweigh the benefits. ALPA argues that "super-pay" acts as the same type of "cleavage in the plant continuing long after the strike is ended" as super-seniority. *Erie Resistor, supra,* 373 U.S. at 231, 83 S.Ct. at 1147. This Court, however, disagrees with ALPA's basic premise that super-pay, like super-seniority, acts as a "sanction" to striking pilots.

35. ALPA relies on the holding of *Erie Resistor* in support of its argument that super-pay "stands as an ever present reminder" of the special rewards to those who refrained from striking and renders future collective bargaining virtually impossible. *Erie Resistor, supra,* 373 U.S. at 231, 83 S.Ct. at 1147. While the Court agrees with the sound application of such reasoning to United's super-seniority plan, the same is not true of super-pay.

36. United, while unable to rationalize super-seniority as a business justification, does make a sound argument in favor of super-pay. The record shows a lack of availability of qualified captains and first officers at the time of the strike which did require United to solicit the currently employed pilots of other airlines. This required the airline to offer a pay scheme sufficient to attract qualified replacements. Furthermore, the pay scales were reasonable considering the pilots' experience and qualifications.

37. In addition, super-pay does not have the same permanent, destructive effect upon pilots who chose to strike as does super-seniority. Although super-pay may serve as a reminder of who did and did not honor the strike, it does not disadvantage striking pilots by changing their domiciles, lowering their salaries and subjecting them to future layoffs. While a striking pilot may be unhappy having to serve with a less senior pilot earning a higher salary, United's business justification clearly outweighs the harm to the striking pilots.

38. Plaintiff's reading of the holding in *S & W Motor Lines, Inc.* v. *N.L.R.B.*, 621 F.2d 598 (4th Cir.1980), is too limited. When read as a whole, *S & W Motor* actually supports United's position. The court in *S & W Motor*, although invalidating the $50 per trip bonus to nonstrikers as violative of § 8(a)(1) and § 8(a)(5) of the NLRA, noted that such a determination was "permitted but not compelled" by the earlier decision in *N.L.R.B.* v. *Rubatex Corp.*, 601 F.2d 147 (4th Cir.1979). In *Rubatex*, the court held that special payment to nonstrikers *after* the completion of a strike was patently and indisputably illegal, but that payments made during a strike, in some circumstances, would be proper and justifiable. *Id.* at 150. *Rubatex*, therefore, focused on when the condition was instituted, and not merely that the super-pay would remain effective after the strike. If a court determines that the super-pay was reasonably necessary at the time of its inception, such a bonus may be upheld. Therefore, the Court's decision to treat super-pay as within the realm of a "business justification" is in accordance with both *Rubatex* and *S & W Motor*.

D. *United's Affirmative Defenses*

39. United argues that ALPA is barred from obtaining the equitable relief it seeks because of its unlawful and bad faith conduct before and during the strike. Specifically,

United alleges that ALPA comes to this Court with unclean hands in three respects: first, it has insisted to impasse on permissive and illegal subjects of bargaining, thereby violating its bargaining duty under Section 2, First of the RLA; second, it has violated the RLA's *status quo* provision by engaging in economic warfare before the end of the cooling-off period; and third, it has engaged in bad faith, coercive photographing of nonstriking employees. United, however, has failed to establish that any of its affirmative defenses bar ALPA's claims for injunctive relief.

40. United's first affirmative defense is that ALPA, in violation of its duty to bargain under Section 2, First, insisted to impasse over subjects relating to the Group of 500, TCAs, and the Association of Flight Attendants ("AFA"). An impasse arises only when there is a deadlock in negotiations after both sides have used their best efforts to negotiate in good faith but neither is willing to move from its position. *See, e.g., Electric Machinery Co.* v. *N.L.R.B.*, 653 F.2d 958, 963 (5th Cir. 1981). Moreover, both sides are under a duty to bargain to impasse over each mandatory subject of bargaining. *See, e.g., Chambers Mfg. Co.*, 124 N.L.R.B. 721 (1959), *enf'd*, 278 F.2d 715 (5th Cir.1960). United's negotiator testified, however, that at the point when United broke off negotiations, two ALPA proposals, which United concedes are mandatory subjects, were still open issues and were on the table. There was, therefore, no impasse when United broke off negotiation on May 25, 1985, because the parties had not deadlocked or bargained to impasse over the remaining mandatory issues. Moreover, ALPA sought to continue discussions, the NMB later sought to resume discussions, and United refused unless its preconditions were met. The fact that agreement was reached almost immediately after United agreed to resume talks demonstrates that there was no impasse.

41. With respect to a flight attendant back-to-work agreement, there is no evidence to support United's contention that ALPA sought to bargain over the provisions of a back-to-work agreement for flight attendants who honored ALPA's picket line. ALPA never negotiated with respect to the terms of a flight attendant agreement; its only concern was that United and AFA negotiate an agreement satisfactory to AFA. ALPA's support of those efforts was limited to taking the position that it would wait to ratify any United/ALPA agreement that might be reached until AFA reached its own agreement with United.

42. In *United States Pipe and Foundry Co.* v. *N.L.R.B.*, 298 F.2d 873, 877-78 (5th Cir.1962), the court held that a union's insistence during bargaining on a common expiration date for its own as well as its sister unions' contracts was not unlawful. The court reasoned that a common expiration date "vitally affects the ability of each union separately to bargain" because "each union might be able to negotiate a more advantageous new contract for the employees represented by that union." *Id.* Similarly, ALPA and AFA were supporting each other during the strike and during their separate back-to-work negotiations in a way that vitally affected the ability of each to bargain separately with United.

43. United next argues that certain conduct of ALPA or United pilots prior to the strike was unlawful because it violated the *status quo* provisions of § 6 of the RLA. In particular, United contends that pilots took sick leave to which they were not entitled during the months prior to the strike. At trial, however, United could not identify a single pilot who took sick leave prior to the strike who was not actually sick. Moreover, § 6 of the Norris-LaGuardia Act provides that a union cannot be held responsible for the unlawful acts of its officers, members, or agents "except

upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof." 29 U.S.C. § 106. The standard of "clear proof" requires that United prove the elements by clear and convincing evidence rather than a mere preponderance of the evidence. *See United Mine Workers* v. *Gibbs*, 383 U.S. 715, 737, 86 S.Ct. 1130, 1145, 16 L.Ed.2d 218 (1966). Not only did United fail to produce "clear proof" that ALPA authorized or ratified a sickout, but it admitted that it had no evidence that ALPA was involved. Even if certain individual pilots did improperly take sick leave, therefore, ALPA cannot be held responsible.

44. United further contends that other prestrike conduct violated RLA § 6. Specifically, United points to the handbilling at a trade conference, communications to travel agents, seeking the assistance of other pilot unions to thwart United's strike replacement efforts, the boycott and photographing of the road shows, and alleged coercion or intimidation of the Group of 500 not to cross the picket line.

45. United has failed to identify any authority to supports its proposition that such conduct amounts to "self help." The *status quo* provision of § 6 is designed "to prevent the union from striking and management from doing anything that would justify a strike." *Detroit & Toledo Shore Line Railroad Co.* v. *United Transportation Union*, 396 U.S. 142, 150, 90 S.Ct. 294, 299, 24 L.Ed.2d 325 (1969). It is identical in "intent and effect" to the *status quo* provision in RLA § 10, which bars unilateral changes in the conditions out of which the dispute arose. *Id.* at 152, 90 S.Ct. at 300.

46. Even if the Court were to assume, as United suggests, that the Seventh Circuit's decision in *Brotherhood of Locomotive Engineers* v. *Baltimore & Ohio Railroad Co.*, 310 F.2d 513 (7th Cir.1962), has been implicitly over-

ruled, the Supreme Court has held that district courts have the power to issue injunctions notwithstanding contrary provisions of the Norris-LaGuardia Act in order "to vindicate the processes of the Railway Labor Act." *Brotherhood of R.R. Trainmen v. Chicago River & Indiana R.R. Co.*, 353 U.S. 30, 41, 77 S.Ct. 635, 641, 1 L.Ed.2d 622 (1957). Such a policy is necessary "to give effect to all our labor laws." *Chicago & Northwestern Ry. Co. v. United Transportation Union*, 402 U.S. 570, 573, 91 S.Ct. 1731, 1733, 29 L.Ed.2d 187 (1971). In *Virginian Railway Co. v. System Federation No. 40*, 300 U.S. 515, 57 S.Ct. 592, 81 L.Ed. 789 (1936), the Court held that the Norris-LaGuardia Act restricts federal jurisdiction to issue injunctions "only so far as its provisions do not conflict with" those of the Railway Labor Act. *Id.* at 563, 57 S.Ct. at 607.

47. While § 8 is applicable to injunctions under the RLA, there must be an "accommodation" of the policies of the two statutes. *Brotherhood of Railroad Trainmen v. Chicago River & Indiana Railroad Co.*, 353 U.S. 30, 40, 77 S.Ct. 635, 640, 1 L.Ed.2d 622 (1957). Thus, in *Local 553, Transport Workers Union of America v. Eastern Air Lines, Inc.*, 695 F.2d 668, 679 (2d Cir.1983), had the union in fact refused to meet and negotiate with the carrier regarding the right of flight attendants to work on new routes, § 8 might appropriately have been held to bar enjoining the carrier from flying those routes with nonunion flight attendants. Similarly, in *Brotherhood of Railroad Trainmen* v. *Akron and Barberton Belt Railroad Co.*, 385 F.2d 581 (D.C.Cir. 1967), the carrier had sought to enjoin a strike where it had refused to meet with the union to discuss lawful § 6 notices. These cases turn on the causal relationship between the complainant's unlawful conduct and the defendant's conduct sought to be enjoined. In these circumstances, a court's refusal to issue an injunction may

force both sides to utilize the RLA dispute resolution mechanisms, and thereby effectuate the purposes of the statutory scheme.

48. Where denial of an injunction would not effectuate the purposes of the RLA, but would merely promote the economic self-interest of a party to the dispute, the appropriate accommodation of § 8 of the Norris-LaGuardia Act and the provisions of the RLA sought to be enforced is to enjoin conduct in violation of express RLA obligations. For similar reasons equitable doctrines such as clean hands should not be applied to override the public interest in enforcing RLA obligations. Thus, in *Empresa Ecuatoriana De Aviacion* v. *District Lodge No. 100, supra,* 690 F.2d 838, despite the fact that the union had supported an unlawful wildcat strike, and despite the presence of strike-related violence and harassment including "misinformation that the airline had ceased operations [which] was distributed to travel agencies" (*Id.* at 842), the court ordered reinstatement with back pay for strikers whom the employer had replaced in violation of the RLA. Referring to a similar holding in *National Airlines, Inc. v. Int'l. Assoc. of Machinists,* 430 F.2d 957 (5th Cir.1970), the court reasoned:

> In *National Airlines II* we held that wildcat strikers who had been fired while freeze provisions of the Act were in effect were entitled to reinstatement with full benefits including backpay. The wrong of the strikers was not indicated to be a bar, and in ordering a remedy we did not engage in a new balancing of striker misconduct versus employer misconduct. Again, a court must keep central to its consideration the national policies underlying the Railway Labor Act and not individual feelings of judges about who has and who has not behaved badly.

Empresa, supra, 690 F.2d at 847. The case for disregarding misconduct in favor of enforcing the RLA is even stronger in the present case. The misconduct does not involve any violence, United has not demonstrated any economic injury, and the individuals adversely affected by United's policies with respect to the Group of 500 and the system rebid would suffer substantial and irreparable injury if no injunction is issued.

49. Furthermore, United has failed to demonstrate that the doctrine of unclean hands even applies in this case. The court in *International Union v. Local Union No. 589,* 693 F.2d 666 (7th Cir.1982), stated that "the clean hands doctrine only applies where there is a direct nexus between the bad conduct and the activities sought to be enjoined." *Id.* at 672. The conduct which ALPA seeks to enjoin had its genesis long before any ALPA conduct that took place during and after the strike. United has never asserted, and has offered no evidence to support its contention, that the pre-strike conduct on which it relies in any way affected its policies with respect to the Group of 500, super-seniority or super-pay. Similarly, there is no evidence that any pre-strike ALPA conduct affected the outcome of the negotiations, the failure to reach an agreement before May 17, 1985, the UAL-MEC's decision to strike, or the course of negotiations after May 16, 1985. Moreover, United has failed to demonstrate that it was injured in any way by the purported misconduct. In short, ALPA's purported "bad conduct" has no nexus with the conduct ALPA seeks to enjoin and therefore cannot be grounds for denial of equitable relief.

50. ALPA has satisfied the standards for a permanent injunction. United's continuing violations of the Railway Labor Act plainly constitute irreparable injury to ALPA for which there is no remedy at law. The Supreme Court

has repeatedly recognized that the judiciary has broad injunctive powers to enforce the obligations of the Railway Labor Act:

> More is involved than the settlement of a private controversy without appreciable consequences to the public. The peaceable settlement of labor controversies, especially where they may seriously impair the ability of an interstate rail carrier to perform its service to the public, is a matter of public concern. . . . Courts of equity may, and frequently do, go much further both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved.

Virginian Railway Co. v. System Federation No. 40, 300 U.S. 515, 552, 57 S.Ct. 592, 601, 81 L.Ed. 789 (1937).

51. To the extent that any of the foregoing conclusions of law are deemed to be findings of fact, they are hereby adopted as findings of fact.

III. CONCLUSION

Based on the foregoing findings of fact and conclusions of law, it is hereby ordered that:

1. The Court declares that United's policies of denying employment and accrued seniority to the Group of 500 pilots and of conducting and attempting to implement the strike-related rebid of pilot positions violate the Railway Labor Act, 45 U.S.C. §§ 151, *et seq.*

2. The Court declares that United's policies of paying to fleet-qualified permanent replacement captains and second officers rates of $75,000 and $50,000 per year, respec-

tively, does not violate the Railway Labor Act, 45 U.S.C. §§ 151, *et seq.*

3. Judgment is entered in favor of plaintiff and against defendant on plaintiff's claims regarding the Group of 500 pilots and the strike-related rebid of pilot positions.

4. Judgment is entered in favor of defendant and against plaintiff on plaintiff's claim regarding rates of pay for fleet-qualified permanent replacements.

5. Defendant, its officers, agents and employees are hereby:

(a) directed and enjoined to restore the "Group of 500" pilots who elected to respect ALPA picket lines to the status of employees, and to assign them immediately to line pilot service if they completed their training, and otherwise permit them to complete their training without discrimination, and then enter line service, with seniority in all cases accrued from May 17, 1985;

(b) restrained and enjoined from implementing bid awards made to pilots during the pilot strike, or from in any other way preferring nonstrikers for any vacancies that have arisen since the end of the strike or will arise in the future.

6. Pursuant to Fed.R.Civ.P. 52(b), the Court reserves the right to amend the above findings and conclusions or make additional findings and conclusions upon motion of either party made no later than ten days from today and the Court may amend the judgment accordingly.

IT IS SO ORDERED.

APPENDIX C

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

No. 85 C 4765

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Plaintiff,

v.

UNITED AIR LINES, INC.,

Defendant.

HONORABLE NICHOLAS J. BUA, *Presiding*

ORDER

Before the Court are motions filed by both ALPA and United to amend the Court's August 1, 1985 Order. Also pending is a joint stipulation to amend submitted by the parties. For the reasons stated below, plaintiff's motion to amend is denied and defendant's motion is granted.

ALPA seeks to amend the Court's Order to include an award of back pay for the Group of 500 student pilots ordered reinstated by the Court on August 1, 1985. United seeks to amend the Court's Order, which required 'immediate" reinstatement of the Group of 500, to allow United to place the Group of 500 on a preferential hiring list and reinstate Group members as positions become available in the future. United argues that the Group of 500 were permanently replaced during the strike and therefore should not be immediately reinstated to their former positions.

United estimates that if Group members are placed on a preferential hiring list, all of the Group of 500 will be hired by August of 1986.

ALPA's arguments in support of its motion and in opposition to United's motion are without merit. First, the pilots' strike was neither "caused" nor "prolonged" by an unfair labor practice by United. Although the Court has found that United violated the RLA by its treatment of the Group of 500 and its attempt to rebid the airline, those violations were not sufficient to constitute an unfair labor practice strike. Although United's positions on these two issues undoubtedly "aggravated" the strike, they did not "prolong" it, as that term is defined. *See Allied Industrial Workers Local No. 289 v. N.L.R.B.*, 476 F.2d 868, 882 (D.C. Cir. 1973). *See also Road Sprinkler Fitters Local No. 669 v. N.L.R.B.*, 681 F.2d 11, 20 (D.C. Cir. 1982); *N.L.R.B. v. Moore Business Forms,* 574 F.2d 835, 840 (5th Cir. 1978); *N.L.R.B. v. Jackson Press, Inc.*, 201 F.2d 541, 546 (7th Cir. 1953). Three other issues, in addition to the Group of 500 and the rebid, separated the parties following the tentative agreement on the economic package. See August 1, 1985 Order, Finding of Fact ¶ 71.

Furthermore, United has not waived its right to raise the permanent replacement defense. First, the Smith affidavit, which is uncontradicted, is not new evidence but merely updates and clarifies testimony given at trial. Second, United argued before, during and after trial that it had the right to hire and retain permanent replacements in response to the strike. United's failure to advance the permanent replacement issue with reference to the Group of 500 is understandable given that it was not until the Court issued its August 1 Order that the Group of 500 were first considered employees of United. Since there was sufficient evidence at trial to support United's permanent replacement defense

even without the later-filed Smith Affidavit, ALPA was not unfairly prejudiced by United's post-trial permanent replacement argument. ALPA does not contest the accuracy of the evidence, but rather argues that the Group of 500 should be reinstated despite their permanent replacement because of an unfair labor strike. The unfair labor strike issue, however, raised at trial and is now rejected by the Court. Since the Group of 500 were properly replaced during the strike, they are not entitled to back pay, but rather back-dated seniority and preferential hiring in the future.

Accordingly, the Court's August 1, 1985 Order is amended. Finding of Fact 82's amended as follows (bracketed text is deleted and underscored text is added):

> 82. United expects to expand and will need additional pilots. Tr. 121, 551. [United has already offered second officer jobs to nearly 700 additional pilots, of whom only about 300-350 entered training during the strike. Tr. 246-47.] *Beginning on or about May 17, 1985 and continuing thereafter during the strike, United made offers of permanent employment to replacement pilots, 539 of which offers were accepted prior to the end of the strike. Tr. 246-48; Smith Affidavit, ¶ 2. Out of the 539 offers, 267 permanent replacements entered training during the strike. Smith Affidavit, ¶ 3. Although 114 of the permanent replacements have yet to begin their training, the delay in commencement of their training is due to the fact that United's training facilities have been utilized to their maximum capacities.* The remaining pilots would enter training after the strike was settled. Nonetheless, United's position as expressed to the Court is that it will not employ any of the Group of 500 who refused to cross the picket lines during the strike. Tr. 56. United's

policy is that "this Group of 500 will not be employed by United." Tr. 121. The only possible exception to this policy is that if the individual did not report on May 17 due to "personal hardship" or "extenuating circumstances," he or she would be "offered employment." Tr. 251. United, however, will not consider those who failed to report on May 17 "if their reason for failing to show up for work was a refusal to cross the picket line." Tr. 366.

The following Conclusions of Law are added immediately following Conclusion of Law 24:

24a. Although the "Group of 500" were employees of United on May 17, 1985, beginning on that date and continuing through the strike United lawfully hired 539 permanent replacements for the striking members of the Group of 500. *See Brotherhood of Ry. and Steamship Clerks v. Florida East Coast Ry. Co.*, 384 U.S. 238, 244 (1966); *NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345-46 (1938); *Flight Engineers Int'l. Ass'n. v. Eastern Airlines, Inc.*, 359 F.2d 303, 310-311 (2d Cir. 1966); *Air Line Pilots v. Southern Airways*, 49 L.R.R.M. 3145, 3152 (S.D. Tenn. 1962). Permanent replacements hired from outside the company, unlike striking pilots who cross over, need not actually begin working in order to retain their jobs following the conclusion of a strike. *Cf. N.L.R.B. v. Cutting, Inc.*, 701 F.2d 659 (7th Cir. 1983) *with International Assoc. of Machinists v. J. L. Clarke Co.*, 471 F.2d 694 (7th Cir. 1972). *See also H. & F. Binch Co. v. N.L.R.B.*, 456 F.2d 357, 362 (2d Cir. 1972).

24b. An employer may refuse to reinstate strikers if the employer establishes that replacements for the strikers were hired on a permanent basis before the employer received the strikers' offer to return to work. *Cutting, supra,* 701 F.2d at 662. Although the replacement worker must have accepted the company's offer of permanent employment, "actual arrival on the job should not be required if an understanding has been reached that this will occur at a reasonably early date." *H. & F. Binch Co., supra,* 456 F.2d at 362.

United need not displace the 539 permanent replacements to create positions for members of the Group of 500 who elected to honor ALPA's picket lines. *Mackay Radio, supra,* 304 U.S. at 345-46. Rather, the latter group of employees are entitled to preferential reinstatement for all positions which become available in the future. *See N.L.R.B. v. Fleetwood Trailer Co.,* 389 U.S. 375, 381 (1967). United presently estimates that it will be able to offer reinstatement to all members of the Group of 500 before August of 1986.

Conclusion 5(a) is amended as follows (bracketed text is deleted and underscored text is added):

5(a) directed and enjoined to restore the "Group of 500" pilots *and members of the Class of '79* who elected to respect ALPA picket lines to the status of employees *on inactive status,* [and to assign them immediately to line pilot service if they completed their training, and otherwise permit them] *and to accord preferential rehire rights to them whereby they shall be entitled, upon the opening of positions for which they are qualified and upon*

the completion of their training, to be assigned to line pilot service. Such individuals shall be permitted to complete their training without discrimination, and then enter line service, with seniority in all cases accrued from May 17, 1985. *Seniority for members of the Class of '79 shall be determined by the adjusted seniority date established by their recall prior to May 17, 1985.*

CONCLUSION

Plaintiff's motion to amend the Court's August 1, 1985 Order is denied. Defendant's motion to amend the Court's August 1, 1985 Order is granted.

IT IS SO ORDERED.

/s/ NICHOLAS J. BUA

. . . . . .

NICHOLAS J. BUA
Judge, United States District Court

Dated: September 5, 1985

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

Nos. 85-2726 and 85-2833

September 29, 1986

JUDGMENT—ORAL ARGUMENT

Before:

HON. HARLINGTON WOOD, JR., *Circuit Judge*

HON. JOHN L. COFFEY, *Circuit Judge*

HON. JAMES E. NOLAND, *District Judge**

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Plaintiff-Appellee, Cross-Appellant,

vs.

UNITED AIR LINES, INC.,
Defendant-Appellant, Cross-Appellee.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

No. 85-C-4765

NICHOLAS J. BUA, Judge.

---

* The Honorable James E. Noland, Chief Judge of the United States District Court for the Southern District of Indiana, is sitting by designation.

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this case appealed from be, and the same is hereby, AFFIRMED IN PART and REVERSED IN PART, in accordance with the opinion of this Court filed this date. Each party is to bear its own costs on appeal.

APPENDIX E

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

Nos. 85-2726, 85-2833

December 22, 1986

ORDER

Before:

HON. HARLINGTON WOOD, JR., *Circuit Judge*

HON. JOHN L. COFFEY, *Circuit Judge*

HON. JAMES E. NOLAND, *District Judge**

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Plaintiff-Appellee, Cross-Appellant,

vs.

UNITED AIR LINES, INC.,
Defendant-Appellant, Cross-Appellee.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

No. 85 C 4765

NICHOLAS J. BUA, Judge.

---

* The Honorable James E. Noland, Chief Judge of the United States District Court for the Southern District of Indiana, is sitting by desgination.

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed in the above-entitled cause by plaintiff-appellee cross-appellant on October 14, 1986, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

APPENDIX F

RAILWAY LABOR ACT, 45 U.S.C. § 151 *et seq.*

§ 151. Definitions; short title

When used in this chapter and for the purposes of this chapter—

* * *

Fifth. The term "employee" as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is conferred upon it to enter orders amending or interpreting such existing orders: *Provided, however,* That no occupational classification made by order of the Interstate Commerce Commission shall be construed to define the crafts according to which railway employees may be organized by their voluntary action, nor shall the jurisdiction or powers of such employee organizations be regarded as in any way limited or defined by the provisions of this chapter or by the orders of the Commission.

The term "employee" shall not include any individual while such individual is engaged in the physical operations consisting of the mining of coal, the preparation of coal, the handling (other than movement by rail with standard railroad locomotives) of coal not beyond the mine tipple, or the loading of coal at the tipple.

§ 151a. General purposes

The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier

engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

* * *

§ 152. General duties

* * *

Third. Designation of representatives

Representatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this chapter need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

Fourth: Organization and collective bargaining; freedom from interference by carrier; assistance in organizing or maintaining organization by carrier forbidden; deduction of dues from wages forbidden

Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have

the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided,* That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

Fifth. Agreements to join or not to join labor organization forbidden

No carrier, its officers, or agents shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization; and if any such contract has been enforced prior to the effective date of this chapter, then such carrier shall notify the employees by an appropriate order that such contract has been discarded and is no longer binding on them in any way.

* * *

§ 181. Application of subchapter I to carriers by air

All of the provisions of subchapter I of this chapter except section 153 of this title are extended to and shall cover every common carrier by air engaged in interstate or foreign commerce, and every carrier by air transporting mail for or under contract with the United States Government, and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service.

§ 182. Duties, penalties, benefits, and privileges of subchapter I applicable

The duties, requirements, penalties, benefits, and privileges prescribed and established by the provisions of subchapter I of this chapter except section 153 of this title shall apply to said carriers by air and their employees in the same manner and to the same extent as though such carriers and their employees were specifically included within the definition of "carrier" and "employee", respectively, in section 151 of this title.

No. 86-1296

Supreme Court, U.S.
FILED
MAR 10 1987
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1986

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Petitioner,

v.

UNITED AIR LINES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STEPHEN P. SAWYER*
ROBERT P. CASEY
UNITED AIR LINES, INC.
1200 East Algonquin
Elk Grove Township, IL 60007
(312) 952-7385

JOEL H. KAPLAN
GARY S. KAPLAN
BRENDA D. HOFMAN
SEYFARTH, SHAW, FAIRWEATHER & GERALDSON
55 East Monroe Street
Suite 4200
Chicago, IL 60603
(312) 346-8000

Attorneys for Respondent
**Counsel of Record*

Pandick Technologies, Inc., Chicago • (312) 236-0200

COUNTERSTATEMENT OF THE QUESTIONS

1. Whether pre-hire pilot trainees who failed to report to work on their first day of employment, never were on United's payroll, and never performed work for United, are "employees" under the Railway Labor Act, which specifically defines that term as "every air pilot or other person who performs any work as an employee or subordinate official of such carrier . . . , subject to its . . . continuing authority to supervise and direct the manner of rendition of his service," 45 U.S.C. § 181?

2. Whether the court of appeals exceeded its authority by reversing, based on the undisputed facts as found by the district court, the district court's application of an erroneous legal standard under the Railway Labor Act's definition of "employee," 45 U.S.C. § 181?

STATEMENT REQUIRED BY RULE 28.1

Respondent United Air Lines, Inc. is a wholly owned subsidiary of Allegis Corporation (formerly UAL, Inc.), which has no parent company.

TABLE OF CONTENTS

	Page
COUNTERSTATEMENT OF THE QUESTIONS .	i
STATEMENT REQUIRED BY RULE 28.1	ii
TABLE OF AUTHORITIES	iv
COUNTERSTATEMENT OF THE CASE	2
ARGUMENT FOR DENIAL OF THE WRIT	6
I. THE WRIT SHOULD BE DENIED BECAUSE THE SEVENTH CIRCUIT'S APPLICATION OF THE LEGAL STANDARD DEFINING "EMPLOYEE" UNDER THE RLA IS FULLY CONSISTENT WITH THE DECISIONS OF THIS COURT AND THE OTHER COURTS OF APPEALS	6
II. THE DECISION BELOW FULLY COMPORTS WITH FED. R. CIV. P. 52(a) AND THE STANDARDS THEREUNDER AS RECENTLY REITERATED BY THIS COURT	11
CONCLUSION	15

TABLE OF AUTHORITIES

Cases: *Page*

Air Line Pilots Ass'n, Int'l v. Alaska Airlines, Inc., 735 F.2d 328 (9th Cir. 1984) 8

Air Micronesia, 10 N.M.B. 11 (1982) 9-10

Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369 (1969) 9

Donovan v. American Airlines, Inc., 686 F.2d 267 (5th Cir. 1982) 7, 10

Icicle Seafoods, Inc. v. Worthington, 106 S. Ct. 1527 (1986) 11, 12

International Longshoremen's Ass'n v. North Carolina State Ports Auth., 370 F. Supp. 33 (E.D.N.C. 1974), *aff'd*, 511 F.2d 1007 (4th Cir. 1975) (per curiam) 7

Nashville, C. & St. Ry. v. Railway Employees' Dep't, 93 F.2d 340 (6th Cir. 1937), *cert. denied*, 303 U.S. 649 (1938) 8-9

Nelson v. Piedmont Aviation, Inc., 750 F.2d 1234 (4th Cir. 1984), *cert. denied*, 471 U.S. 1116 (1985) 2, 7, 9, 11

NLRB v. New England Tank Indus., Inc., 302 F.2d 273 (lst Cir.), *cert. denied*, 371 U.S. 875 (1962) 9

NLRB v. North Arkansas Coop., Inc., 446 F.2d 602 (8th Cir. 1971) 11

NLRB v. Wheeling Elec. Co., 444 F.2d 783 (4th Cir. 1971) 11

Pennsylvania R. Co. v. Day, 360 U.S. 548 (1959) 8

	Page
Pullman-Standard v. Swint, 456 U.S. 273 (1982)	12
Scheduled Skyways, Inc., 10 N.M.B. 488 (1983)	10
Walling v. Portland Terminal Co., 330 U.S. 148 (1947)	6, 10, 14
Statutory Provisions:	
Fair Labor Standards Act, Section 3(e), 29 U.S.C. § 203(e)	7
National Labor Relations Act, 29 U.S.C. § 151 *et seq.*	9
Railway Labor Act, Section 1, Fifth, 45 U.S.C. § 151, Fifth	2, 4, 7, 11
Railway Labor Act, Section 2, Fourth, 45 U.S.C. § 152, Fourth	10-11
Railway Labor Act, Section 201, 45 U.S.C. § 181	2, 4
Other Authority:	
Fed. R. Civ. P. 52(a)	11, 12, 14
S. Ct. Rule 17.1	1, 6

No. 86-1296

In The
Supreme Court of the United States
October Term, 1986

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Petitioner,

v.

UNITED AIR LINES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, United Air Lines, Inc. ("United"), opposes the Petition for Writ of Certiorari by Air Line Pilots Association, International ("ALPA"). Recognizing the requirements of Rule 17.1 of this Court, ALPA asserts that this case has "widespread importance" in the airline industry because it concerns the rights of "newly hired workers" and the scope of "permissible carrier coercion" under the Railway Labor Act, 45 U.S.C. §151 *et seq.* ("RLA" or "Act"). Pet. at 2.

In fact, however, this case is simple and straightforward, and involves nothing more than an interpretation of the RLA's explicit definition of the word "employee." *See* 45 U.S.C. §§151, Fifth, 181. As it relates to the peculiar facts of this case, this issue, stripped to its essentials, is whether the so-called "Group of 500" (a group of pre-hire United pilot trainees) achieved "employee" status under the Act. If, as the Seventh Circuit correctly held below, they did not achieve that status, they neither enjoy rights under the RLA nor may obtain a remedy under that Act for the supposed acts of "carrier coercion" that ALPA alleges were inflicted upon them by United.

This is precisely what the court of appeals held in this case. Because the unanimous decision below correctly applies the governing legal principles to the undisputed relevant facts as found by the district court and is fully consistent with the decisions of this Court and other courts of appeals, including most recently *Nelson v. Piedmont Aviation, Inc.*, 750 F.2d 1234 (4th Cir. 1984), *cert. denied*, 471 U.S. 1116 (1985), the Petition presents no issue warranting review by this Court and should be denied.

COUNTERSTATEMENT OF THE CASE

This case arises out of a labor dispute between ALPA and United under the RLA. In that dispute, which culminated in a costly 29-day pilots' strike against United in 1985, ALPA sought to enhance the economic interests of its members, while United sought to maintain its market position in the highly volatile and competitive post-deregulation airline industry. (App. 5a, 61a-62a).[1] One of the issues litigated following the conclusion of the strike concerned the status of a group of pre-hire pilot trainees

---

[1] In particular, United was burdened with a pay scale under which pilots could earn in excess of $150,000 annually, while comparable pilots flying for some United competitors earn

(Footnote continued on following page)

known as the "Group of 500," most of whom, due to coercive pressure from ALPA (App. 70a, 79a, 117a), became participants in the dispute by refusing to report for their first day of employment on May 17, 1985, which also was the first day of the strike.

Although ALPA repeatedly refers to the Group of 500 as "newly-hired pilots" or "employees" who had a right to strike against their "employer," *see* Pet. at i, 2, 7, 8 & *passim*, the Seventh Circuit squarely held, as discussed below, that the "500" were *not* employees because they never performed any work for United. Thus, despite ALPA's claim that this case raises the issue of "carrier coercion under the RLA," Pet. at 2, 13-16, no such issue is present here. Rather, as the court below recognized in full accordance with other courts, the "500," as non-employees, simply were not entitled to the protections afforded employees under the RLA. *See infra* pp. 6-11.

Selection of what came to be the Group of 500 began in 1984, when United implemented a program (its first since 1977-79) to screen and train a pool of individuals from which it later could draw pilots to fill entry-level second officer positions as needed. (App. 63a). Actual employ-

---

(Footnote 1 continued)

no more than $75,000. (App. 62a; Def. Ex. 144 pp. 7-8, 171). Although ALPA agreed during the 1984-85 negotiations to a new-hire pay scale that would more realistically reflect market conditions, negotiations broke off over, and the strike was precipitated by, the parties' disagreement as to when the new scale would "merge" with (i.e., equal) incumbent rates; ALPA sought a significantly shorter merger period, which was unacceptable to United because it would have effectively blunted the benefit of the lower new-hire rates. (App. 80a-81a). Thus, the strike was not, as contended by ALPA, "over United's demand for a reduced pay scale for newly-hired pilots" or "over [the Group of 500's] pay scale," Pet. at 2, 6, but rather over ALPA's efforts to preserve the higher-than-market salaries enjoyed by incumbent United pilots.

ment of these pre-trained applicants was to be delayed until "United had secured a cost competitive agreement with ALPA." (App. 65a). Thus, applicants selected for the pre-hire training program (the Group of 500) each executed an identical "Flight Officer Training Agreement" in which they agreed that "[d]uring this training, I understand that *I will not be an employee of United Airlines* and will receive no compensation from United other than expense money." (App. 65a, emphasis added, quoting Def. Ex. 140; *see also* App. 102a-103a). In early Spring 1985, United began to extend offers of employment to the Group of 500 to commence on May 17, 1985. These offers made clear that the individuals accepting were expected to report for work on that date "whether or not there was a strike." (App. 67a-68a).

The district court unequivocally found as a matter of fact (and, as discussed *infra* pp. 12-13 & note 11, without challenge by ALPA) that the Group of 500 never satisfied the RLA statutory definition of "employee" prior to May 17, 1985, their first assigned day of employment. (App. 65a-66a, 103a, 104a).[2] For example, at no time prior to May 17, 1985 did any member of the Group of 500 enter on United's payroll or receive a seniority number or an assignment to a line position. (App. 69a).[3] The trial court's

---

[2] Pursuant to the 1936 amendments extending the RLA to the airline industry, 49 Stat. 1189, the Act applies to "every air pilot or other person *who performs any work as an employee* or subordinate official of [a common carrier by air], *subject to its . . . continuing authority to supervise and direct the manner of rendition of his service.*" 45 U.S.C. §181 (emphasis added), *quoted in* App. 43a. Section 1, Fifth provides more generally, but in similar fashion, that the term "employee" as used in the Act "includes every person *in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee* or subordinate official . . . ." 45 U.S.C. §151, Fifth (emphasis added).

[3] In the trial court, ALPA itself stipulated that the Group of 500 were merely "pilot candidates" who never entered onto United's pilot seniority list. (Stip. ¶36).

findings also made clear that the "500" knew well in advance of May 17, 1985 that United viewed them "as a pool of trained replacements for striking pilots" (App. 69a), and that United repeatedly informed them that, to become United employees, they had to report to work on May 17 for their assigned first day of employment. (App. 67a-69a).[4] Notwithstanding the foregoing, however, the district court also held that the Group of 500 automatically became employees of United on May 17 simply because they had previously accepted employment offers "effective" that date. (App. 67a, 104a). It therefore ordered United to accord them "the status of employees on inactive status" and to accord them the "preferential rehire rights" to which permanently replaced employees are entitled. (App. 126a-128a).[5]

The Seventh Circuit agreed with the district court that none of the Group of 500 attained "employee" status prior to May 17, 1985, but reversed the district court's holding that the non-reporting members of the Group achieved that status on May 17. Noting that, under the statutory definition, "the district court refused to find that the Group of 500 were employees during their training period" and that "ALPA does not contest this conclusion," the court of appeals emphasized:

> There is no dispute regarding the factual findings made by the district court surrounding the Group

---

[4] The trial testimony of ALPA's own Group of 500 witnesses confirmed that they were not employees during their training and that they knew that they had to report on May 17, 1985 to begin their service with United and become "employees." (Tr. 165, 185, 217, 220-22; *see also* Tr. 1381-82, 1390, 1395, 1404-05 (testimony of other Group of 500 members)).

[5] United did not move to stay the district court's Order pending appeal. To the contrary, pursuant to the Order, it allowed the "500" to complete their training as positions opened and assigned them to line pilot service, where they remain to this day.

> of 500; rather, the issue is whether, given these facts, the court properly applied the RLA to conclude that the Group of 500 were United employees as of May 17. In other words, it is . . . a question of whether the proper legal standard was applied.

(App. 42a). After reviewing the statutory definition of "employee" under the RLA and the authorities cited by the parties (including the authorities cited by ALPA in its Petition to this Court), the court of appeals concluded that the Group of 500 failed to perform work for United under United's supervision as required by the Act, and therefore did not become United employees on May 17. (App. 44a, 47a-48a). Subsequently, the Seventh Circuit also unanimously denied ALPA's Petition for Rehearing and Suggestion for Rehearing In Banc, wherein ALPA raised the same arguments set forth in the instant Petition to this Court. (App. 132a).

ARGUMENT FOR DENIAL OF THE WRIT

I. THE WRIT SHOULD BE DENIED BECAUSE THE SEVENTH CIRCUIT'S APPLICATION OF THE LEGAL STANDARD DEFINING "EMPLOYEE" UNDER THE RLA IS FULLY CONSISTENT WITH THE DECISIONS OF THIS COURT AND THE OTHER COURTS OF APPEALS.

1. ALPA's Petition fails to state "special and important reasons" warranting this Court's review of the Seventh Circuit's unanimous holding concerning the non-"employee" status of the Group of 500. S. Ct. Rule 17.1. To the contrary, that holding specifically relied upon, and is fully consistent with, the relevant decisions of this Court as well as those of the other courts of appeals and the National Mediation Board ("NMB"). *See Walling v. Portland Terminal Co.*, 330 U.S. 148 (1947) (under virtually identical definition of "employee"

in FLSA,[6] brakeman trainees were not employees where they never displaced regular employees, never expedited the employer's business, and never received any compensation until they were hired from hiring list); *Nelson v. Piedmont Aviation, Inc.*, 750 F.2d 1234, 1236 (4th Cir. 1984), *cert. denied*, 471 U.S. 1116 (1985) (rejecting plaintiff's "invit[ation] . . . to participate in a creative exercise in statutory redraftsmanship" of the RLA definition of employee; "the statutory language does not admit of doubt. At the time of his application to Piedmont, [plaintiff] was not 'in the service of a carrier' and did not 'perform any work' for an airline as specified by 45 U.S.C. § 151, Fifth."); *Donovan v. American Airlines, Inc.*, 686 F.2d 267 (5th Cir. 1982) (individuals in training as sales agents and flight attendants are not "employees" under FLSA where they never went on airline's payroll and never displaced, substituted for, or supplemented regular airline employees); *International Longshoremen's Ass'n v. North Carolina State Ports Auth.*, 370 F. Supp. 33, 40 (E.D.N.C. 1974), *aff'd*, 511 F.2d 1007 (4th Cir. 1975) (per curiam) (noting that "the employee must be in the service of a carrier and the work performed must bear a direct relationship to the transportation activities of the . . . carrier").

Despite ALPA's refusal to recognize the existence of these cases in its Petition, each squarely supports the holding below under virtually identical factual circumstances. Given the Seventh Circuit's thorough discussion of these authorities (App. 46a-48a & n.19), United need not belabor the issue here by reiterating their facts and holdings.

2. None of the cases cited by ALPA in its Petition conflicts with either the holding below or the line of

---

[6] The Fair Labor Standards Act ("FLSA"), quite like the RLA, defines "employee" as "any individual employed by an employer." 29 U.S.C. § 203(e). Indeed, if anything, the FLSA definition is *broader* than that under the RLA. *See supra* note 2.

authority on which it relies. Indeed, the Seventh Circuit thoroughly examined each of ALPA's cases and properly distinguished them as inapposite to the case at bar.

Thus, in *Pennsylvania R. Co. v. Day*, 360 U.S. 548 (1959), a case on which ALPA places its primary reliance, *an employee*, before retiring, filed a grievance under the terms of his collective bargaining agreement seeking compensation allegedly due to him "*for work performed while on active duty.*" *Id.* at 551 (emphasis added). Thus, contrary to ALPA's mischaracterization of this Court's decision (Pet. at 8), *Day* did not hold that a retiree is an "employee" under the RLA definition or that the courts are free to ignore the statutory language. To the contrary, *Day* stressed that the National Railroad Adjustment Board possessed continued jurisdiction over the retiree's grievance because the grievance "ar[ose] out of the *relationship between carrier and employee* . . . . The purpose of the Act is fulfilled if the claim itself arises out of the *employment relationship* which Congress regulated." *Id.* at 551-52 (emphasis added). *See also Air Line Pilots Ass'n, Int'l v. Alaska Airlines, Inc.*, 735 F.2d 328 (9th Cir. 1984) (quoting *Day* and holding that retiree's grievance over calculation of retirement benefits under the collective bargaining agreement was arbitrable), *cited in* Pet. at 9. Plainly, therefore, *Day* and *Alaska Airlines* have no applicability here, where no "employment relationship" as defined by the Act was ever established. The Seventh Circuit easily and correctly found those cases to be inapposite. (App. 45a).

Similarly inapposite, as stressed by the decision below (App. 48a n.19), is *Nashville, C. & St. Ry. v. Railway Employees' Dep't*, 93 F.2d 340 (6th Cir. 1937), *cert. denied*, 303 U.S. 649 (1938) (furloughed employees were "employees" under the RLA where they had performed services for their employer, retained their seniority rights, were only on temporary furlough, and were already back at work by the time the case was tried). Indeed, the Sixth Circuit placed great emphasis in that case on the

"particularity" of the RLA definition of "employee" and on the need "to examine that definition with care." *Id.* at 342. Accordingly, ALPA's repeated efforts to portray *Nashville Ry.* as a case which cast aside the statutory definition as mere so-called "terms of art" (Pet. at 9, 10) fall short of reality. *See Nelson*, 750 F.2d at 1237 ("[*Nashville Ry.*] does not expand the meaning of 'employee' under the RLA").

Equally unavailing is *NLRB v. New England Tank Indus., Inc.*, 302 F.2d 273 (lst Cir.), *cert. denied*, 371 U.S. 875 (1962), *cited in* Pet. at 14, which relied on the unique unfair labor practice provisions of the National Labor Relations Act ("NLRA"), 29 U.S.C. §151 *et seq.*, and the particular factual context the court faced in that case. *Id.* at 277-78. The Seventh Circuit correctly distinguished *New England Tank* on the basis that the NLRA definition of "employee" is not controlling under the RLA given the latter's specific definitional language. (App. 47a & n. 19).[7]

Finally, in its effort to demonstrate a conflict between the decision below and the determinations of the NMB, ALPA's Petition turns those determinations on their heads. For example, contrary to ALPA's novel "interpretation" of *Air Micronesia*, 10 N.M.B. 11 (1982), that case squarely supports the Seventh Circuit's decision, as the opinion below recognized. (App. 45a-46a). In *Air Micronesia*, it was contended that trainees who (in contrast to the Group of 500) had completed their training were eligible to vote as "employees" because they "ha[d] a reasonable expectation of employment." *Id.* at 12. The NMB *rejected* this conten-

---

[7] In *Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369 (1969), this Court expressly rejected the notion that the RLA contains prohibitions against employer conduct "comparable" to the prohibitions set forth in the NLRA. *Id.* at 385 n.20. "The [NLRA] cannot be imported wholesale into the railway labor arena. Even rough analogies must be drawn circumspectly, with due regard for the many differences between the statutory schemes." *Id.* at 383.

tion. Explicitly framing the issue as whether individuals "who have not yet worked for the carrier . . . are eligible to vote," and quoting with emphasis the "performs-any-work" and "subject-to-supervision" portions of the Section 201 definition of "employee," the NMB held that trainees who "have never been on the carrier's payroll as working employees" are not "employees" under the RLA, notwithstanding their alleged " 'reasonable expectation' of future employment." *Id.* at 14.[8] Similarly distinguishable is *Scheduled Skyways, Inc.*, 10 N.M.B. 488 (1983),[9] where "the employees in training [were] receiving the same pay and benefits as other pilots," "report[ed] to the same supervisory officials and [were] subject to the same policies and procedures as pilots who ha[d] completed their training," and had commenced full on-line flying duties for the carrier by the time the NMB issued its decision. *Id.* at 490-91.

3. ALPA argues that the effect of the decision below is to deny the "500" the right to strike in violation of the "purpose" of Section 2, Fourth of the RLA. Pet. at 13-16. Thus, according to ALPA, the court of appeals' decision "serves an antiunion purpose" because it "authorize[s] carriers to obtain involuntary, coerced strikebreakers." Pet. at 14, 15. This argument is merely a variation of ALPA's disagreement with the court's holding that the "500" did not achieve "employee" status on May 17. Because the

---

[8] The courts have likewise uniformly rejected the "expectation-of-employment" theory. *See, e.g., Walling*, 330 U.S. at 149-50 (trainees not "employees," even though they completed their on-property training program and were placed on hiring list); *Donovan*, 686 F.2d at 268-69 (trainees not "employees," even though they were actually assigned base cities during training and were told to "resign from other employment and leave automobiles behind" upon commencing training).

[9] ALPA mistakenly cites the case as appearing at 12 N.M.B. 488.

Group of 500 did not achieve that status under the RLA definition, they were not entitled to the protections afforded to "employees" by Section 2, Fourth, 45 U.S.C. § 152, Fourth. In so holding, the Seventh Circuit's decision is fully consonant with the decisions of the other courts of appeals. *See, e.g., Nelson*, 750 F.2d at 1236-37 (individual who does not meet statutory definition of "employee" is "plainly not subject to the protections of [the RLA]"); *NLRB v. North Arkansas Coop., Inc.*, 446 F.2d 602, 610 (8th Cir. 1971) (similar holding under NLRA); *NLRB v. Wheeling Elec. Co.*, 444 F.2d 783, 784 (4th Cir. 1971) (same).

II. THE DECISION BELOW FULLY COMPORTS WITH FED. R. CIV. P. 52(a) AND THE STANDARDS THEREUNDER AS RECENTLY REITERATED BY THIS COURT.

To create a reviewable issue where none exists, ALPA also claims that the Seventh Circuit's unanimous decision exceeded the permissible scope of appellate review under Fed. R. Civ. P. 52(a) and this Court's recent holding in *Icicle Seafoods, Inc. v. Worthington*, 106 S. Ct. 1527 (1986). This argument, which the Seventh Circuit explicitly considered and rejected in both its original decision (App. 41a-42a) and its denial of ALPA's Petition for Rehearing (App. 131a-132a; *see* ALPA's Pet. for Rehearing at 6-10), is frivolous.

1. Most important, ALPA's argument that the court of appeals made *de novo* findings of fact is belied by the district court's decision itself. Indeed, noting the RLA's dual definitional requirements for "employee" status – i.e., that the individual be (1) "in the service of the carrier" and (2) "subject to [the carrier's] continuing authority to supervise and direct the manner of rendition of his services" (App. 102a, quoting 45 U.S.C. §151, Fifth) – the district court unequivocally found as a matter of fact that the "500" never satisfied either component of the statutory definition. (App. 102a-103a). Rather, the district court held,

based on its mistaken view of the legal standard imposed by the RLA definition, that the "500" were employees as of May 17 *despite* their failure ever to report for work. (App. 103a-104a). Thus, the district court repeatedly referred to the Group of 500 as "student pilots" and "trainees" throughout its findings of fact and conclusions of law. (*See* App. 57a *passim*). ALPA also conveniently ignores the district court's express factual findings that "United did not want the [trainees] 'on the property' while the negotiations were in progress" (App. 64a) and that:

> United did not assign any member of the Group of 500 to the line, or provide them with final seniority numbers prior to May 17, 1985, whether or not they completed their initial training, whether or not they completed their refresher training, or whether or not they completed their IOE [initial operating experience].

(App. 70a).

Thus, the court of appeals had no reason to remand this case after reversing the district court's erroneous legal conclusion. To the contrary, because "[t]here is no dispute regarding the factual findings made by the district court surrounding the Group of 500" (App. 42a), the court of appeals accepted those findings as required by Rule 52(a), *Icicle*, and *Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982), and merely applied the proper legal standard of "employee" status under the RLA.[10]

2. Moreover, ALPA may not at this late date undo the district court's factual findings. Until its Petition for Rehearing below, ALPA repeatedly relied upon and

---

[10] In citing *Swint*, ALPA overlooks that this Court's holding turned on the fact that the Fifth Circuit "rejected the District Court's finding [and] made its own findings." 456 U.S. at 284. Here, by contrast, the court of appeals specifically relied upon and adopted the district court's findings "after having reviewed the entire evidence." (App. 4a n.1, 41a-44a, 48a n.19).

adopted the district court's finding that the "500" became employees on (but not before) May 17, arguing in the court of appeals that this finding was "amply supported and must be sustained." ALPA Opening Brief dated Jan. 6, 1986 at 32; *see also id.* at 33. As the decision below observed: "[T]he district court refused to find that the Group of 500 were employees during their training period. ALPA does not contest this conclusion." (App. 43a; *see also* App. 42a).[11]

Even if ALPA could properly raise such factual issues at this stage in the litigation, however, its contentions would have to be rejected. For example, although ALPA relies on the fact that 10-12 of the Group of 500 had performed their initial operating experience ("IOE"), the district court never found that IOE was "work," under either the contract or the RLA definitions of "employee"; to the contrary, the district court found that IOE was a prerequisite "to become fully qualified to engage in line flying" (App. 67a), and found that trainees who had IOE'd, along with the other members of the Group of 500, did *not* achieve "employee" status prior to May 17. (App. 69a-70a, 103a). *A fortiori*, trainees who had completed only their initial qualifying training and therefore had not yet IOE'd also could not have become "employees." *See* Pet. at 19. In any event, even assuming *arguendo* that some of the "500" had completed their training prior to May 17 and had become

---

[11] In fact, prior to its Petition for Rehearing before the Seventh Circuit, ALPA never even contended that the "500" satisfied the statutory definition of employee prior to May 17. *See* ALPA's Post-Trial Proposed Findings Of Fact And Concl. Of Law at pp. 55-65, 113-14. In its post-trial Motion To Amend (dated August 8, 1985), ALPA specifically relied upon Judge Bua's holding "that the members of the Group of 500 were employees *as of May 17, 1985.*" (Motion at 2, ¶1, emphasis added; *see also* Supporting Mem. at 1). In its August 25, 1985 Memorandum In Opposition to United's Motion To Amend, ALPA likewise asserted that "*the Group of 500 became employees on May 17.*" (Mem. In Opp. at 3, 4, 6, emphasis added).

qualified as pilots, having done so would not equate with being an "employee," either logically or as a matter of law. *See, e.g., Walling*, 330 U.S. at 153 (graduates of training school who were trained on the carrier's property and then placed on hiring list merely "consititute[d] a labor pool from which the railroad could later draw its employees").

Thus, although ALPA now purports to cite various "facts" in arguing that the Group of 500 or some "subgroup(s)" thereof[12] might have performed work sufficient to meet the statutory definition of "employee," Pet. at 18-19, the short and simple answer to that argument is that all of this evidence was before the district court, which, as trier of fact, found ALPA's evidence insufficient under the definition. *See* Fed. R. Civ. P. 52(a). ALPA presents no reason why it should be permitted to relitigate factual issues which were previously decided in United's favor and not challenged on appeal by ALPA.

---

[12] For example, ALPA now argues that a limited number of the "500" might have been RLA "employees" because they purportedly served as FOTIs ("Flight Officer Training Instructors") prior to May 17. Pet. at 18. This argument is a red herring because the FOTI is a separate job classification at United from that of pilot. In any event, the district court found that *none* of the "500" (necessarily including the FOTIs) achieved "employee" status prior to May 17, 1985.

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

STEPHEN P. SAWYER*
ROBERT P. CASEY
UNITED AIR LINES, INC.
1200 East Algonquin
Elk Grove Township, IL 60007
(312) 952-7385

JOEL H. KAPLAN
GARY S. KAPLAN
BRENDA D. HOFMAN
SEYFARTH, SHAW, FAIRWEATHER
& GERALDSON
55 East Monroe Street
Suite 4200
Chicago, IL 60603
(312) 346-8000

Attorneys for Respondent
**Counsel of Record*

March 5, 1987

Supreme Court, U.S.
FILED
MAR 13 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1296

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Petitioner,

v.

UNITED AIR LINES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITIONER'S REPLY BRIEF

MICHAEL E. ABRAM*
CHRISTOPHER N. SOURIS
STEPHEN PRESSER
COHEN, WEISS and SIMON
330 West 42nd Street
New York, New York 10036
(212) 563-4100

Attorneys for Petitioner
Air Line Pilots Association,
International

**Counsel of Record*

490

TABLE OF AUTHORITIES

CASES	PAGE
Air Micronesia, 10 N.M.B. 11 (1982)	4-5
Donovan v. *American Airlines, Inc.*, 686 F.2d 267 (5th Cir. 1982)	3
Icicle Seafoods, Inc. v. *Worthington*, 106 S. Ct. 1527 (1986)	6, 7
International Longshoremen's Ass'n v. *North Carolina State Ports Auth.*, 370 F. Supp. 33 (E.D.N.C. 1974), *aff'd per curiam*, 511 F.2d 1007 (4th Cir. 1975)	4
Nelson v. *Piedmont Aviation, Inc.*, 750 F.2d 1234 (4th Cir. 1984), *cert. denied*, 471 U.S. 1116 (1985)	3
NLRB v. *Erie Resistor Corp.*, 373 U.S. 221 (1963)	6
NLRB v. *New England Tank Indus., Inc.*, 302 F.2d 273 (1st Cir.), *cert. denied*, 371 U.S. 875 (1962)	1-2, 5
Pennsylvania R.R. v. *Day*, 360 U.S. 548 (1956)	4
Pullman-Standard v. *Swint*, 456 U.S. 273 (1982)	6, 8
Railway Labor Executives' Ass'n v. *Boston & Maine Corp.*, 808 F.2d 150 (1st Cir. 1986)	5
Scheduled Skyways, Inc., 10 N.M.B. 488 (1983)	4
Walling v. *Portland Terminal Co.*, 330 U.S. 148 (1947)	3

STATUTES	
29 U.S.C. § 151	5
29 U.S.C. § 201	3
29 U.S.C. § 203(e)(1)	3
29 U.S.C. § 203(g)	3
45 U.S.C. § 151	1
45 U.S.C. § 151, Fifth	*passim*
45 U.S.C. § 152, Fourth	2, 5
45 U.S.C. § 181	8

IN THE

Supreme Court of the United States

October Term, 1986

No. 86-1296

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Petitioner,

v.

UNITED AIR LINES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITIONER'S REPLY BRIEF

At issue in this case is whether the Railway Labor Act ("RLA"), 45 U.S.C. § 151 *et seq.*, protects the ability of newly-hired workers, who were not hired as strike replacements, to participate in lawful strike activity on the date designated by the carrier as their first day of employment. As petitioner Air Line Pilots Association, International ("ALPA") explained in its petition, the court of appeals' construction of § 1, Fifth of the RLA, 45 U.S.C. § 151, Fifth, to deny such protection to the Group of 500 in this case disregards the undisputed congressional intent underlying that provision, clashes with the settled judicial and administrative approach to § 1, Fifth, and directly conflicts with the First Circuit's decision in *NLRB* v. *New England*

Tank Indus., Inc., 302 F.2d 273 (1st Cr.), *cert. denied*, 371 U.S. 875 (1962). In addition, the court of appeals impermissibly engaged in de novo factfinding in applying its newly-devised interpretation of § 1, Fifth to the circumstances surrounding the Group of 500's pre-strike relationship with respondent United Air Lines, Inc. ("United").

In response, United is content to ignore both the central question presented by this dispute and the Seventh Circuit's actual resolution of that question. Thus United offers *no* defense whatsoever of the court of appeals' mistaken interpretation of the language contained in § 1, Fifth but instead turns to a handful of cases involving "trainees" or "applicants" who, unlike the Group of 500, were not actually hired and unconditionally directed to commence employment on a specified date and did not choose to participate in a lawful strike on their first day of work. United likewise brushes aside the court of appeals' de novo factfinding on the manifestly false representation that the district court determined that the Group of 500 did not "perform work" for United before the strike. United's conspicuous silence on any of the issues raised by ALPA's petition underscores the need to review the Seventh Circuit's decision in this case.

1. Without considering any of the policies underlying § 2, Fourth of the RLA, 45 U.S.C. § 152, Fourth, the court of appeals determined that it was "forced to conclude" (App. 44a) that the "ordinary meaning" (App. 48a) of § 1, Fifth barred any consideration of whether newly-hired pilots became RLA employees on the date designated by the carrier as their first day of employment because such pilots "never performed work for the employer and [were] never under that employer's direct supervision." (App. 47a). As ALPA explained in its petition, however, the court of appeals simply misunderstood the statutory terms

contained in § 1, Fifth. Congress quite plainly intended the "performs work" clause in § 1, Fifth to exclude independent contractors from RLA coverage and the "supervision" clause to exclude supervisors or management employees. (Pet. 9-10). United does not dispute this critical legislative intent. Accordingly, the court of appeals' *sole* ground for reversing the district court's application of the RLA to the Group of 500 constituted a mistaken application of statutory terms that Congress did not intend to cover the circumstances involved in this case. United is unable to articulate any explanation for this fatal error and indeed offers absolutely no defense of the Seventh Circuit's unprecedented construction of § 1, Fifth.

Instead, United maintains that the decision below is "fully consistent" (Opp. Br. 6) with two RLA cases and two cases decided under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.*, involving applicants or trainees. (Opp. Br. 6-7). Yet none of these cases involved workers who. like the Group of 500, were hired and assigned unconditional employment dates. The trainees involved in United's FLSA cases, for example, merely constituted a pool of qualified individuals available for possible *future* job offers upon the completion of training. *See Walling* v. *Portland Terminal Co.*, 330 U.S. 148, 149-50 (1947); *Donovan* v. *American Airlines, Inc.*, 686 F.2d 267, 268-70 (5th Cir. 1982). In any event, the determination of whether trainees constitute FLSA "employees," *see* 29 U.S.C. §§ 203(e)(1), 203(g), depends on whether their activities "immediately benefit" the employer, not on the "performs work" analysis adopted by the court of appeals in this case. *See Walling*, 330 U.S. at 152-53; *Donovan*, 686 F.2d at 271-72. The RLA decision in *Nelson* v. *Piedmont Aviation, Inc.*, 750 F.2d 1234 (4th Cir. 1984), *cert. denied*, 471 U.S. 1116 (1985), likewise involved a job applicant who was *not*

offered employment on the basis of his pre-application conduct at another employer. *See id.* at 1235.[1]

As the district court recognized in this case, the Group of 500 cannot possibly be equated with these trainees or applicants. (App. 67a-68a, 103a-104a). In late April of 1985, the Group of 500 accepted United's unconditional employment offers which plainly designated May 17, 1985 as their first day of employment and which did not require Group members to work during a strike. (App. 67a-68a). When Group members began reporting for refresher training in early May of 1985, United confirmed that they would assume "permanent status" on May 17. (App. 67a). It was not until well *after* United hired the Group of 500 and unconditionally established May 17 as their first day of work that United began to view them as potential strike replacements. (App. 69a-70a, 108a).[2] As of May 17, 1985, United and the Group of 500 had thus established the "employment relationship" required by § 1, Fifth. *See Pennsylvania R.R.* v. *Day*, 360 U.S. 548, 552 (1956). That relationship has never depended on the "perfroms work" analysis now required by the Seventh Circuit. *See, e.g., Scheduled Skyways, Inc.*, 10 N.M.B. 488 (1983) (treating pilot trainees on the carrier's payroll as RLA employees); *Air Micronesia*, 10 N.M.B. 11 (1982) (RLA

---

[1] The only § 1, Fifth issue in *International Longshoremen's Ass'n* v. *North Carolina State Ports Auth.*, 370 F. Supp. 33 (E.D.N.C. 1974), *aff'd per curiam*, 511 F.2d 1007 (4th Cir. 1975), was whether the defendant's employees were involved in the defendant's railroad rather than its trucking operation. *See id.* at 39-40.

[2] Accordingly, United's statement that the Group of 500 "knew well in advance of May 17, 1985" that United "viewed" them as potential strike replacements (Opp. Br. 5) simply misrepresents the district court's explicit finding that United did *not* hire Group members to serve as strike replacements. (App. 68a). United pursued an entirely separate program for hiring strike replacements. (App. 107a).

employee status depends on an individual's reasonable expectation of performing future services for the carrier).

The *only* prior case involving similar facts is the First Circuit's decision in *New England Tank* which explicitly held that individuals who accept employment offers unconditionally designating their first day of employment enter an employment relationship—and thus can participate in protected strike activity—on their first day of work without first "physically report[ing] on the job." *New England Tank*, 302 F.2d at 278. United offers no basis either for distinguishing *New England Tank* or for disregarding the direct conflict between *New England Tank* and the Seventh Circuit's decision in this case.[3] Indeed, the court of appeals itself recognized that *New England Tank* supported the district court's treatment of the Group of 500 and only declined to follow the First Circuit on the basis of its mistaken understanding of the statutory terms contained in § 1, Fifth. (App. 47a-48a). Given United's complete failure to defend the court of appeals' opinion, the Court should grant review in this case to resolve the direct conflict between the Seventh and the First Circuits over whether newly-hired workers can join in protected strike activity on the date designated by the employer as their first day of work.

Moreover, United also offers no response to ALPA's argument that United's attempt to coerce the Group of 500

---

[3] Contrary to United's cryptic discussion of *New England Tank*, that case did not in any sense turn on the definition of "employee" or the "unique unfair labor practice provisions" contained in the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151, *et seq.* (Opp. Br. 9). As the court of appeals held in this case, § 2, Fourth of the RLA, 45 U.S.C. § 152, Fourth—like its NLRA counterparts—protects strikers from employer retaliation. (App. 16a-21a). *See Railway Labor Executives' Ass'n* v. *Boston & Maine Corp.*, 808 F.2d 150, 157 (1st Cir. 1986).

into serving as involuntary strikebreakers constituted unlawful RLA self-help that violated the § 2, Fourth rights of the *incumbent* striking pilots. (Pet. 15-16). The district court's findings establish that United's threats to the Group of 500 lacked any business purpose and constituted part of an overall plan to undermine ALPA's status as the collective bargaining representative of United pilots. (App. 70a-72a, 103a, 107a-108a). The RLA protects the incumbent striking pilots—all of whom are indisputably RLA employees—from such anti-union conduct regardless of whether the court of appeals correctly applied § 1, Fifth to the Group of 500. (App. 16a-21a). *Cf. NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221, 235-37 (1963).

2. Having reversed the district court and adopted a new legal standard for determining employee status under the RLA, the court of appeals was not free to make "factual findings on its own," *Icicle Seafoods, Inc.* v. *Worthington*, 106 S. Ct. 1527, 1530 (1986), or even to apply its new standard to the facts found by the district court. Rather, it was obligated to review the record as a whole to determine whether the "record permits only one resolution of the factual issue." *Pullman-Standard* v. *Swint*, 456 U.S. 273, 292 (1982). As ALPA explained in its petition, however, the court of appeals explicitly limited its review to "the factual findings made by the district court" (App. 42a) despite the existence of unresolved factual issues under its new legal standard that were never considered by the district court. (Pet. 16-20). The court of appeals also improperly found the facts relevant to its new legal standard. (*Id.*).

United's only explanation for the court of appeals' independent factfinding is its repeated claim that the district court "found" that the entire Group of 500 did not become RLA employees *prior* to May 17. (Opp. Br. 12-14). In making that finding, however, the district court applied

the same legal standard it applied to hold that the Group of 500 were employees *on* May 17 and which the court of appeals reversed. As a result, the district court never considered the court of appeals' "performs work" standard (App. 101a-108a) and thus could not possibly have found that the pre-strike activities of all Group of 500 members did or did not constitute "work" under United's "supervision" in accordance with the court of appeals' new interpretation of § 1, Fifth.

Since the nature of a pilot's relationship to United is dispositive under the court of appeals' new legal standard, the labels "student pilots" and "trainees" occasionally used by the district court to describe the Group of 500 (Opp. Br. 12) cannot answer the factual question of whether the "particular activities" of specific Group members prior to May 17 satisfy that new legal standard. *See Icicle Seafoods*, 106 S. Ct. at 1529. As United correctly observes, for example, the district court never determined whether the Initial Operating Experience ("IOE") under United's supervision undertaken by several Group members satisfied the court of appeals' test for RLA employees status. (Opp. Br. 13). Whether IOE constitutes "work" under that test thus plainly presents a question of fact for the district court even if IOE is work necessary " 'to become fully qualified to engage in line flying.' " (*Id.*) (quoting App. 67a). United also ignores ALPA's demonstration of factual issues concerning whether the refresher training entered into by a substantial number of Group members constituted work under United's supervision. (Pet. 19). Since the district court did not make findings "essential to a proper resolution of the legal question" as newly defined by the court of appeals, *see Icicle Seafoods*, 106 S. Ct. at 1530, and since the record clearly "permits [more than] one resolution of

the factual issue," *Swint* 456 U.S. at 292, the court of appeals was obligated to remand for further proceedings.[4]

In any event, the presence of Flight Officer Training Instructors (FOTI's) among the Group of 500 forecloses any argument against the necessity of a remand in this case. Notwithstanding the court of appeals' factual findings, the National Mediation Board has held that United's FOTI's are RLA employees, and a federal court has held that FOTI's among the Group of 500 were RLA employees on May 17. (Pet. 18). United's argument that the FOTI's were "in a separate job classification at United from that of pilot" (Opp. Br. 14 n.12) is simply irrelevant to their status as RLA employees on May 17 under the court of appeals' literal construction of § 1, Fifth. *See also* 45 U.S.C. § 181 (extending RLA coverage to pilots and other employees of air carriers).

[4] Given the district court's rejection of "ALPA's argument that the Group of 500 became employees upon their initial date of training" (App. 103a), United's contention that ALPA never argued that the Group of 500 became employees prior to May 17 (Opp. Br. 12-13) is inexplicable. ALPA also argued in the court of appeals that the Group of 500 were entitled to employee status prior to May 17. (Brief of Plaintiff-Appellee, Cross-Appellant at 39-44; Reply Brief of Plaintiff-Appellee, Cross-Appellant at 9-17).

For these reasons, and those presented in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

MICHAEL E. ABRAM*
CHRISTOPHER N. SOURIS
STEPHEN PRESSER
COHEN, WEISS and SIMON
330 West 42nd Street
New York, New York 10036
(212) 563-4100

Attorneys for Petitioner
Air Line Pilots Association, International

**Counsel of Record*

March 13, 1987